No. 02-682 Status: ARGUED
Title: Verizon Communications Inc., Petitioner
v.
Law Offices of Curtis V. Trinko, LLP
Docketed: November 5, 2002
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (01-7746)
Decision Date: June 20, 2002
Rehearing Denied: October 1, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 1 2002	Petition for writ of certiorari filed. (Response due December 5, 2002)
Dec 4 2002	Order extending time to file response to petition to and including December 13, 2002.
Dec 13 2002	Brief amici curiae of United States and Federal Trade Commission filed.
Dec 13 2002	Brief of respondent Law Offices of Curtis Trinko in opposition filed.
Dec 13 2002	Brief amici curiae of United Parcel Service, Inc., et al. filed.
Dec 13 2002	Brief amici curiae of BellSouth Corporation, et al. filed.
Dec 19 2002	Reply of petitioner Verizon Communications Inc. filed.
Dec 23 2002	Letter from counsel for petitioner received.
Jan 17 2003	Record Requested .
Feb 5 2003	Record received.
Feb 5 2003	Record proceedings from USCA for the Second Circuit and USDC for the Southern District of New York (2 folders).
Feb 27 2003	Partial record proceedings from the USDC for the Southern District of NY (1 folder).
Mar 10 2003	Petition GRANTED limited to the following Question: "Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?".
Mar 19 2003	Extension of time for filing the joint appendix and petitioner's brief on the merits to and including May 23, 2003.
May 15 2003	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
May 19 2003	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
May 23 2003	Brief amici curiae of BellSouth Corporation, SBC Communications, Inc., and Qwest Communications Internatl. filed.
May 23 2003	Brief amicus curiae of Telecommunications Industry Association filed.
May 23 2003	Brief amicus curiae of Communications Workers of America filed.
May 23 2003	Brief amicus curiae of Washington Legal Foundation filed.
May 23 2003	Brief amicus curiae of United States Telecom Association filed.
May 23 2003	Brief amici curiae of Virginia, et al. filed.
May 23 2003	Brief amici curiae of United States and Federal Trade Commission filed.
May 23 2003	Joint appendix filed.
May 23 2003	Brief of petitioner Verizon Communications filed.
May 23 2003	Brief amici curiae of United Parcel Service, Inc., et al. filed.
Jun 3 2003	Extension of time within which to file respondent's brief on the merits to and including

	July 25, 2003.
Jul 7 2003	SET FOR ARGUMENT October 14, 2003.
Jul 17 2003	CIRCULATED.
Jul 23 2003	Brief amici curiae of American Antitrust Institute filed. (Distributed)
Jul 23 2003	Brief amicus curiae of Project to Promote Competition and Inovation in the Digital Age filed. (Distributed)
Jul 24 2003	Brief amici curiae of Law Professors Joseph P. Bauer, et al. filed. (Circulated)
Jul 24 2003	Brief of respondent Law Offices of Curtis V. Trinko, LLP filed. Distributed).
Jul 25 2003	Brief amicus curiae of Consumer Union and Consumer Federation of America filed. (Distributed)
Jul 25 2003	Brief amici curiae of National Association of State Utility Consumer Advocates filed. (Distributed)
Jul 25 2003	Brief amici curiae of AT&T, et al. filed. (Distributed)
Jul 25 2003	Brief amici curiae of Z-TEL Technlogies, Inc. filed. Distributed)
Jul 25 2003	Brief amici curiae of Economics Professors, William J. Baumol, et al. filed. (Distributed)
Jul 25 2003	Brief amicus curiae of Covad Communications Company, Inc. filed. (Distributed)
Jul 25 2003	Brief amici curiae of New York, et al. filed. (Distributed)
Jul 25 2003	Brief amici curiae of Allegiance Telecom, Inc., et al. filed. (Distributed)
Aug 6 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 25 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 29 2003	Reply of petitioner Verizon Communications filed. (Distributed)
Oct 14 2003	Argued. For Petitioner: Richard G. Taranto, and on behalf of the United States, as amicus curiae, Theodore B. Olson, Solicitor General. For Respondent: Donald B. Verrilli, Jr.

FILED

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No. 02 0 2 6 8 2 NOV - 1 2002

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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allegations of inadequacies in a monopolist's affirmative assistance to its rivals, including resellers—as newly provided by incumbent local telephone companies under the Telecommunications Act of 1996—state a claim for unlawful unilateral predatory conduct under Section 2 of the Sherman Act.

2. Whether antitrust and Communications Act standing extends to indirect purchasers, *i.e.*, the customers of the defendant's customer, asserting injuries wholly derivative of the direct customer's injury, even when invoking only the direct customer's legal rights.

RULE 29.6 STATEMENT

Verizon Communications Inc. is the successor corporation of Bell Atlantic Corp., named as defendant and appellee below. Verizon has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Verizon Communications Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' amended opinion (App. 1a-48a) is reported at 305 F.3d 89. The district court's initial opinion (App. 49a-61a) is reported at 123 F.Supp.2d 738. The district court's second opinion (App. 62a-68a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2002. On a petition for panel and en banc rehearing, the court amended its opinion, then denied the petition on October 1, 2002. App. 69a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15, along with provisions of the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56, are set out at App. 70a-103a.

STATEMENT

The Second Circuit held that alleged deficiencies in the terms of affirmative assistance to rivals (as Verizon newly provides to local competitors by law) can be litigated as treble-damages actions under Section 2 of the Sherman Act. That ruling conflicts with the Seventh Circuit's ruling on this specific issue (*Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000)) and with other circuits' rulings strictly limiting the doctrines invoked to transform deficient

affirmative assistance into predatory conduct. The Second Circuit also held that retail customers of Verizon's wholesale customer, having only an indirect-purchaser relation to Verizon, have standing under the antitrust laws and the Communications Act to sue for injury derivative of the direct customer's harm, even when asserting only the substantive rights of the direct customer, who had committed to exclusive nonjudicial dispute resolution and secured relief. This ruling abrogates standing limits recognized elsewhere. Verizon challenges both rulings.

A. Background

This Court's decisions explain the features of the 1996 Act that form pertinent background here. *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1654, 1662-63, 1681 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999). That Act created "something brand new"–"the wholesale market for leasing network elements." *Verizon*, 122 S. Ct. at 1681. It forced incumbent local telephone companies (like Verizon's subsidiaries) to change their local telephone businesses: they now must assist newly created intermediaries to displace them in providing local service to local customers, on terms designed "to give aspiring competitors every possible incentive to enter local retail telephone markets." *Id.* at 1661. The forced change in the incumbents' local businesses was described by a "leading backer of the Act in the Senate" as "'extraordinary'" because incumbents were being ordered to help "'competitors come in and try to beat your economic brains out.'" *Id.* (quoting 141 Cong. Rec. 15572 (1995) (Sen. Breaux)).

Creating new rights and duties, the 1996 Act goes beyond ending legal barriers to local entry (47 U.S.C. § 253) and requiring *all* telecommunications carriers to interconnect, so that a customer physically served by one carrier can communicate with customers physically served by other carriers (§ 251(a)). The Act also imposes on incumbents new duties

to provide affirmative assistance to new rivals, including the duties to provide retail services at a wholesale discount for resale and to rent pieces of the local network ("unbundled network elements," or UNEs) so that the new rivals can use the incumbents' own facilities to displace the incumbent as provider of local service. § 251(c).

To implement the duties, the 1996 Act relies on two levels of expert regulators, federal and state, and guarantees rapid regulatory response to rivals' demands for assistance. *First*: the Federal Communications Commission has issued massive and evolving orders adopting regulations to prescribe what the statutory duties should mean in application. § 251(d).[1] *Second*: for particular cases, the Act creates a negotiation-and-arbitration regime that guarantees a prompt, judicially reviewable regulatory decision on assistance demands, with advance regulatory review and approval of all terms of incumbent-rival relations (§ 252(b), (c), (e)(1)-(5), (i)) and regulatory enforcement of approved terms.[2] *Third*: state and federal regulators review and enforce compliance with the assistance duties before allowing the former Bell incumbents

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[1] *Iowa Utilities* and *Verizon* involved some of the major orders, concerning pricing and other terms of assistance. Regarding pricing, the FCC has adopted a "novel ratesetting" methodology to maximize entry incentives "short of confiscating the incumbents' property." *Verizon*, 122 S. Ct. at 1661. Regarding which pieces of the network must be rentable, sweeping FCC requirements have twice been set aside as overbroad (and hence deterring independent investment by the new rivals). *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424, 427 (D.C. Cir. 2002) (reversing FCC's decision, on remand from reversal of first attempt in *Iowa Utilities*, 525 U.S. at 388-92, explaining that "too broad" a sharing duty can *undermine* the goal of spurring *independent* investment).

[2] *See, e.g., Bell Atlantic-Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304-05 (4th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 1753 (2002); Memorandum Opinion and Order, *Starpower Communications*, 15 FCC Rcd 11277, 11280, ¶ 7 (2000) (FCC recognizing enforcement authority).

to offer long-distance service in each State (§ 271), and the regulators have adopted detailed requirements for high levels of compliance with the assistance obligations.[3]

In 1997, AT&T, as a new local competitor, entered into a binding agreement with Verizon, approved by the New York regulatory commission under the 1996 Act, for the purchase of "access" to Verizon's facilities and services. The Verizon-AT&T agreement "provides for dispute resolution procedures that are the 'exclusive remedy for all disputes between [Verizon] and AT&T arising out of this Agreement or its breach'" and "requires the parties to the agreement to resolve their disputes through arbitration and the administrative process." App. 5a, 38a n.19. Respondent, a New York law firm, bought local telephone service from AT&T and had no relationship with Verizon. App. 1a, 5a. By respondent's description, AT&T was engaged in "resale" of phone service physically being furnished by Verizon.[4]

[3] Verizon was the first incumbent to receive long-distance authorization—for New York, in late 1999 (*AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000))—and now has long-distance authorization for more than 85% of its lines, based on state and federal regulatory commission findings of compliance with the affirmative assistance duties of Section 251.

[4] *See* Ct. App. Br. of Trinko 39-40 ("resale agreement"). Economically, AT&T was a reseller of service physically being furnished by Verizon regardless of which of two options it chose under the agreement: purchasing Verizon "service" at a wholesale price for "resale"; or purchasing the end-to-end package of Verizon-assembled piece parts (UNEs) commonly called "UNE platform." *See* Order Approving Interconnection Agreement, 1997 WL 410707 (NY PSC Case No. 96-C-0723), at *41, *47, *56-57 (providing both options); *Iowa Utils.*, 525 U.S. at 393-95. Whereas "service" is bought in the former arrangement, the latter involves local loop *occupation* by the competitor, because purchase of a loop as an "unbundled network element" gives the competitor *exclusive* occupation of that piece of the incumbent's network. *Local Competition Order*, 11 FCC Rcd 15,499, ¶ 385 (1996).

In December 1999, Verizon encountered a problem in new software (installed to satisfy regulatory demands in the long-distance approval process) for the placement and confirmation of rivals' orders for "access" from Verizon. AT&T complained to regulators, and on March 9, 2000, Verizon entered a consent decree with the FCC "to resolve the problem promptly and pay $3 million to the United States and $10 million to AT&T and other competitors." App. 5a. By July 2000, the problem was resolved, and the decree dissolved. *Id.*[5] The court of appeals here noted the efficient, nonjudicial resolution of the only problem concretely mentioned by respondent in this case. App. 24a.

B. This Case

1. The day after the March 9 consent decree, respondent brought this consumer class action against Verizon. It broadly complained that it had "received poor local phone service" from AT&T and that Verizon, with "no valid business reason," had treated orders by competitors less favorably than it treated orders for retail service from its own customers. App. 6a-7a. Aside from a reference to the just-entered consent decree, the complaint contained no specifics, and it sought to certify a class of all customers of Verizon's competitors dating back to 1996. App. 7a. Respondent alleged that the deficiencies amounted to violations of Section

[5] *See* Memorandum Opinion and Order, *Application of Verizon New England*, 16 FCC Rcd 8988, 9034-35, ¶ 87 (2001) (summarizing events); Order, *Bell Atlantic-New York Authorization*, 15 FCC Rcd 5413 (2000) (March 9 consent decree). The New York commission also addressed the problem. Order Addressing OSS Issues, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 1531916 (NY PSC Cases 00-C-0008 *et al.*) (noting AT&T's redress); Order Directing Market Adjustments and Amending Performance Assurance Plan, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 517633 (NY PSC); Order Directing Improvements to Wholesale Service Performance, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 363378 (NY PSC).

2 of the Sherman Act, warranting treble damages and injunctive relief, as well as violations of Section 202(a) (discrimination) and Section 251 (interconnection) of the Communications Act. App. 6a.

The district court dismissed. App. 49a-61a. The court found antitrust standing but, relying on *Goldwasser*, held that no Section 2 violation was stated by the allegations of deficiencies in providing rivals local loop occupation or service. App. 55a-56a. The court again so held after respondent amended its complaint and described the challenged conduct as Verizon's breach of its agreement with AT&T. App. 63a, 66a-67a. As for the Communications Act claims, the court concluded that respondent, being neither a customer nor a competitor of Verizon, had no substantive rights of its own under Sections 202(a) and 251 and for that reason could not sue, because the Act's suit-authorizing provisions, Sections 206 and 207, do not abrogate the normal rule requiring a party to assert its own legal rights, not a third party's. App. 59a-61a. The court again so held in rejecting the amended complaint. App. 64a-66a.

2. On appeal (which respondent's brief limited to the damages claims), the court of appeals affirmed the dismissal only of the claim under Section 251. App. 16a-25a. Stressing "[t]he elaborate process of negotiation and arbitration set forth in section 252" and the central role of "state regulatory bodies, which have specialized expertise in the area" (App. 23a), the court held that, once an agreement is entered under Section 252, the incumbent's duties are governed not by Section 251 but by the agreement (here, with its dispute-resolution mechanism). The court then reinstated the Communications Act § 202(a) and Sherman Act § 2 claims.

In reinstating the claim under Section 202(a), the court accepted that respondent was asserting only AT&T's Section 202(a) rights (to receive service on nondiscriminatory terms),

not its own (it receives no service from Verizon at all). App. 13a. Nevertheless, while noting the general rule against third-party standing (App. 10a), the court held that the rule was abrogated by the general reference in Sections 206 and 207 to "the person or persons injured" and "person claiming to be damaged," thus allowing suit by any person injured by a violation of any substantive provision of the Communications Act, even if the rights violated are only those of someone else. App. 11a-12a. The court deemed it irrelevant that Section 202(a) itself conferred no rights on respondent, a customer's customer (App. 13a-14a) and cited *L.T. Barringer & Co. v. United States*, 319 U.S. 1, 13 (1943), as indicating that the Interstate Commerce Act, a precursor to the Communications Act, allowed suits by persons lacking rights under substantive provisions (App. 15a). The court also concluded that respondent's alleged receipt of "poor phone service" *from AT&T* was not "indirect" because it was "distinct" from AT&T's injury. App. 15a-16a.

In reinstating the Sherman Act § 2 damages claim, the court of appeals first concluded that respondent had standing. App. 25a-28a. The court recognized that the only asserted injury was "poor phone service" that respondent received from AT&T because of AT&T's treatment by its upstream supplier, Verizon–that is, injury as an indirect purchaser two steps downstream from Verizon. App. 28a. Nevertheless, the court found standing because AT&T, the direct purchaser, was not "solely" a customer of Verizon, but "also a competitor." App. 26a. It relied on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), even while describing the plaintiff there as directly denied payment by the defendant, with no intermediate step making the injury indirect. App. 26a-27a.

On the merits, the court identified two bases for respondent's satisfying the anticompetitive-conduct requirement of Section 2. App. 28a-30a. The first was "essential

facilities": the court held that "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete in a given market." App. 29a, 29a-30a. The second was "monopoly leveraging": the court found sufficient the allegations that Verizon (a) has monopoly power in "a wholesale market in which it sells access to the local loop" (though the access is sold under legal compulsion) and (b) "used that power *to gain a competitive advantage* in a retail market in which telecommunications carriers sell local phone service to consumers," injuring respondent. App. 30a (emphasis added).

The court immediately recognized that, "[i]n *Goldwasser*, the Seventh Circuit dismissed similar allegations" (also brought by consumers). App. 31a. In reaching an opposite conclusion, the Second Circuit nowhere discussed *Goldwasser*'s basic ruling that the "unadorned" Sherman Act, of its own force, does not impose duties to provide assistance to rivals of the very sort alleged both here and there. 222 F.3d at 399-400. Instead, the Second Circuit, having already found actionable conduct, simply reasoned that the 1996 Act granted no implicit immunity from the Sherman Act, there being no "plain repugnancy" between the statutes. App. 31a-33a.

The Second Circuit, not recognizing the novelty of the antitrust duty it created, never considered *Goldwasser*'s analysis of the 1996 Act as a reason for refusing to create such a new Section 2 duty in the first place. Rather, the Court generally discussed *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), as allowing an antitrust claim despite a regulatory regime, though without addressing the differences between that regime and the 1996 Act. App. 34a-35a. In response to *Goldwasser*'s explanation that a new Sherman Act duty "would add nothing to the oversight already available under the 1996 law" in preventing violations (*i.e.*,

actual non-transitory harm to competition overall, as opposed to quickly remedied harm to particular competitors), 222 F.3d at 401, the Second Circuit made only a point about *relief* divorced from whether an antitrust *violation* has occurred: The Second Circuit repeatedly emphasized that allowing this suit was important in "affording the consumer compensation that the Telecommunications Act does not provide." App. 33a; *see* App. 35a, 36a, 37a n.18. In response to *Goldwasser*'s explanation that allowing Sherman Act suits would impair the 1996 Act regime (222 F.3d at 401), the Second Circuit saw no such problem with damages relief (treble damages, in a class action). App. 36a-39a.

REASONS FOR GRANTING THE PETITION

The Second Circuit decision involves important legal issues being litigated in numerous cases across the Nation, creates conflicts with the law of other circuits, and sharply departs from important limits on antitrust duties and on standing to sue. The broadening of unilateral "sharing" duties under Section 2 and the expansion of standing threaten massive new litigation, as already shown by the filing of some 25 new class actions following this decision. For the telecommunications industry, the ruling throws open the door to costly treble-damages, jury-decided litigation over the complex details of assistance that are already under the superintendence of regulators and are intrinsically dispute-generating, as numerous new competitors press demands for more favorable prices and other terms under untested new standards. More generally, the Second Circuit decision presents new conduct-influencing burdens and risks for firms in any market where monopoly allegations can be advanced and class-action lawyers see an opportunity.

The Second Circuit's expansion of antitrust sharing duties unavoidably embraces what other courts have until now firmly resisted: the transformation of federal antitrust judges and juries into regulatory agencies deciding what kinds and

amounts of sharing are required and at what prices. Other courts' resistance to such assistance duties respects a vital antitrust line–between firms' interference with rivals' independent competitive efforts, which antitrust law targets, and provision of affirmative assistance to rivals, which has long been the province of regulation (and of antitrust suspicion, not encouragement). The Second Circuit decision erases that line, creating duties that are fundamentally contrary to normal competitive interests and intrinsically fraught with investment-deterring risks, and assigning courts intractable tasks involving technologically and economically complex and uncertain judgments. And the decision takes this unprecedented step despite the intense control of the very assistance at issue by expert, flexible regulators under the 1996 Act's comprehensive regime, designed to replace the prior *judicial* regulation under the AT&T Breakup Decree. It was the 1996 Act that created the basis for such demands for assistance. This Court should correct the Second Circuit's conversion of these claims into antitrust claims by its alteration of Section 2 law.

The Court should also review the Second Circuit's expansion of standing under the Sherman Act and Communications Act. The bedrock principle that standing is restricted to direct victims, asserting their own legal rights, serves the vital function of confining controversies to allow for their efficient resolution. The Second Circuit decision, abrogating both parts of this principle, invites class actions that transform the judicial process. The ruling permits suits by all indirect purchasers, seemingly anyone in the Nation with a telephone, and the re-opening by third parties of disputes already resolved between the direct parties through their agreed-on forum. This prescription for proliferation of lawsuits cannot stand consistent with recognized limits on standing.

I. THE EXPANSION OF ANTITRUST DUTIES SHOULD BE REVIEWED

The Second Circuit's ruling on Section 2 of the Sherman Act, in conflict with other circuits' decisions, wrongly decides two important substantive issues. First, it vastly expands unilateral Section 2 duties to render affirmative assistance to rivals, contrary to strict limits recognized elsewhere and, most pointedly, contrary to the Seventh Circuit's *Goldwasser* decision rejecting claims indistinguishable from the claims here. Second, the Second Circuit decision endorses monopoly leveraging as a Section 2 theory, contrary to other circuits' holdings. The Second Circuit decision also presents an important issue, and conflict, regarding reliance on regulation in formulating (not just overriding) antitrust duties.

A. The Second Circuit Decision, In Conflict With The Seventh Circuit Holding In *Goldwasser* And With Doctrinal Limits Recognized In Other Circuits, Improperly Expands Section 2 Duties Of Affirmative Assistance

1. The Second Circuit's decision squarely conflicts with the Seventh Circuit's decision in *Goldwasser*. In an opinion by Judge Diane Wood, an antitrust law professor and former Antitrust Division official, the Seventh Circuit required dismissal of a consumer complaint making the very same kind of allegations that respondent makes here–intentionally inadequate, discriminatory assistance on the matters covered by Section 251 of the Communications Act. 222 F.3d at 400-01. The Seventh Circuit specifically reasoned that the asserted duties–not *because* they were Section 251 duties, but because of what in substance they demanded–are "precisely the kinds of affirmative duties to help one's competitors that * * * do not exist under the unadorned antitrust laws." *Id.* at

400.[6] Then, against the background of that pure Sherman Act ruling, the Seventh Circuit explained that there were particularly strong reasons for refusing to recognize new such duties as an antitrust matter: the "antitrust laws would add nothing to the oversight already available under the 1996 law," and adding antitrust duties would not be compatible with the "elaborate system of negotiated agreements and enforcement established by the 1996 Act" for the very matters at issue. *Id.* at 401. The Second Circuit decision here–along with the recent Eleventh Circuit decision following it and disagreeing with *Goldwasser*'s Section 2 ruling–is in irreconcilable conflict with *Goldwasser*.[7]

Goldwasser is merely the most squarely on-point example of a wide range of decisions that apply sharp doctrinal limits on unilateral duties to render assistance to rivals, including under the essential facilities doctrine–limits disregarded in the Second Circuit decision. *First*: The Second Circuit decision

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[6] Among the precedents the Seventh Circuit cited in support of *rejecting* Section 2 coverage of the asserted duties was its own 1983 decision in *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1149 (7th Cir. 1983). At the cited page, the *MCI* court, having upheld a claim for local interconnection to enable long-distance competition, rejected a claim for access to AT&T's long-distance network to speed up long-distance competition. *See Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir. 1991) ("AT&T's refusal to voluntarily assume 'the extraordinary obligation to fill in the gaps in its competitor's network' did not suffice to support a finding that it was trying to maintain its monopoly of long-distance telephone service by anticompetitive means."). It is the *rejected* (same-level, same-market) claim in *MCI* that is closer to claims, like respondent's, involving assistance under the 1996 Act.

[7] *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), *rehearing petition pending*. Unlike the Second and Eleventh Circuits, most district courts have "dismissed antitrust claims based on conduct subject to the 1996 Act." *Covad Communications Co. v. Bell Atlantic Corp.*, 201 F.Supp.2d 123, 130 n.19 (D.D.C. 2002) (citing cases), *appeal pending*.

recognizes a Section 2 duty to sell end-user services, at a discount, to mere resellers. But a Section 2 duty to sell to such "non-competitive middlem[e]n" has been firmly rejected elsewhere. *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353 (5th Cir. 1980); *see HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877-78 (6th Cir. 1991); *see also MCI*, 708 F.2d at 1149 (discussed in note 6, *supra*: rejecting duty on AT&T to resell long-distance transport service to MCI).

Second: The Second Circuit decision imposes an *antitrust* duty to change one's business—here, to sell "access" to the local loop on "reasonable" terms. (The 1996 Act compelled such sales, which had not been made voluntarily, and the Act did not expand *antitrust* duties. *See* 47 U.S.C. § 152 note (savings clause).) By contrast, in *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544-45 (4th Cir. 1991), the Fourth Circuit, after noting the usual articulation of the essential-facilities doctrine as requiring access only where "feasible," held that access to train *track* was not feasible because the defendant railroad was not in the business of renting out its track. The Second Circuit holding is incompatible with the ruling that a defendant has no duty to change its business of providing end-user service into one of renting facilities to intermediaries providing end-user service. *See City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir. 1992) (no duty of pipeline to transport gas instead of selling its own).

Third: The Second Circuit decision allows essential-facility challenges to the *terms* of access, without *denial* of access or cessation of competition. But in *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996), the Third Circuit affirmed rejection of an essential-facilities claim because there was no denial of use of the facility, only a dispute about the reasonableness of terms. *See also Alaska*

Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 545-46 (9th Cir. 1991).

Fourth: The Second Circuit decision allows essential-facility claims even for unbundled network element loop rental, where the renter's use is exclusive, displacing's the defendant's. *See* note 4, *supra*. But the Seventh and Ninth Circuits have recognized that a defendant has no essential-facility duty to give "preferential access" or to "abandon its facilities." *MCI*, 708 F.2d at 1133; *cf. City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992) (Section 2 does not require defendant "to cease using its own facility so that [a rival] can begin using it").

2. The circuits' repeated recognition of principles strictly limiting any unilateral duty to assist rivals, together with the near-absence of any actual holding of essential-facilities liability (*see* pp. 16-17, *infra*), reflects fundamental antitrust law and policy. Antitrust law targets positive hindrance of rivals' independent efforts, not insufficient affirmative assistance to rivals. *See* S. Breyer, *Regulation and Its Reform* 157 (1982) (The antitrust laws "act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do."); *Burris*, 935 F.2d at 1484 (negative/affirmative line).[8] Indeed, Section 2 does not require general dismantling of lawful monopolies, *see United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920) (Section 2 "does not compel competition"), yet that would be the result of a general duty to support mere resale, because separation of retailing (marketing) from production is almost always possible.

[8] The distinction between failure to render assistance and active interference in others' independent actions is fundamental elsewhere in the law. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (relying on same line in holding that failure to provide assistance is not "deprivation" under Due Process Clause).

Familiar antitrust policies, both substantive and institutional, must drastically limit any court-administered duties of assistance. *Substantively*: Forced access reduces the incentives that antitrust law centrally encourages–to invest in rival facilities to lower cost and thus raise output. Incumbents will invest less if they must share, and new entrants will invest less where sharing is easier and less risky. Such effects, which are not amenable to reliable judicial assessment, would in fact render sharing of a monopoly, if voluntary, suspect under Section 1. *Institutionally*: Courts (juries) are unsuited to, and have traditionally avoided, the inevitable task of defining the "proper" price and other terms of forced access. *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.) ("antitrust courts normally avoid direct price administration"). Neither problem is avoided by limiting the remedy to treble damages, as the Second Circuit suggested. App. 35a-39a. That powerful weapon designedly regulates conduct and thus affects investment incentives; and judicial assessment of the terms of assistance is unavoidable to determine *liability* in the first place.

For such reasons, "scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access, and accompanying judicial price setting." *United States Telecom Ass'n*, 290 F.3d at 424, 427 n.4; *see* IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 770e, 773a, at 167-169, 196-98 (2d ed. 2002). Indeed, leading commentators have urged abolition of the essential-facilities doctrine.[9] The

[9] IIIA Areeda & Hovenkamp, ¶ 771c at 173 ("Lest there be any doubt, we state our belief that the essential facility doctrine is both harmful and unnecessary and should be abandoned."); Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 St. Louis U. L.J. 433, 479-80 (1987) (Gregory Werden, long-time Antitrust Division economist and prolific author on antitrust law and economics, wrote: "The Supreme Court has never acknowledged the essential facility doctrine. The Court's abstention was wise. The lower courts should reject the doctrine.").

comparative advantage of regulatory agencies–with both expertise and the flexibility repeatedly to adjust the balance between too much assistance and too little–is plain. In the 1996 Act, Congress assigned the delicate balancing task to regulatory agencies. The duties should not now be converted into antitrust obligations defined by juries.

3. The Second Circuit's antitrust ruling not only conflicts with other circuits' expressed limits on affirmative-assistance duties to rivals; it extends such duties beyond any previous holding of liability. This Court has never recognized the essential facilities doctrine. *See Iowa Utils.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part). And there has scarcely ever been liability for wholly unilateral action–and then only in very narrow circumstances sharply different from the circumstances in this and other cases asserting access duties like those under the 1996 Act.[10]

The Seventh Circuit's 1983 *MCI* case is the rare such case, but its special circumstances are reflected in the fact that the Seventh Circuit in *Goldwasser* cited *MCI* to *reject* an assistance claim like respondent's. The defendant (AT&T) had been voluntarily providing local interconnection to others; the duty was limited to providing *local* interconnection for *long-distance* service, two voluntarily separated markets using

[10] Importantly, both *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), to which "essential facilities" is sometimes traced, and *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), which seems to have introduced the term, involved concerted, not unilateral, action. In this context, as in antitrust law generally, the distinction is basic. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984); IIIA Areeda & Hovenkamp, ¶ 772d, at 192-93 (concerted/unilateral distinction critical); Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 844 (1989) ("concerted action is exceptional, whereas unilateral action is omnipresent"; "concerted exclusion is much easier to remedy," by inclusion on nondiscriminatory terms; "admission to a joint venture is a one-time remedy that does not require day-to-day control" by the courts).

separate facilities; the local monopoly was protected by law against entry and subject to traditional rate regulation guaranteeing recovery of local-facility investments; MCI asked for no displacement of AT&T's use of its facilities; and MCI challenged flat-out terminations and refusals, not mere unreasonableness of terms. *See* 708 F.2d at 1093, 1095, 1133.[11] In that no-longer-present combination of circumstances, forced sharing might not have deterred investment by incumbents (being protected by the local monopoly and rate regulation) or local rivals (being legally forbidden anyway); and the court, including the jury, was not called on to play the regulatory role of price-and-term administration. The inapplicability of that essential-facility analysis to the quite different present context, involving the access duties created under the 1996 Act, has been well recognized even by a principal proponent of 1996 Act rights.[12] The "access to the

[11] Two decisions of this Court cited by the Second Circuit, though not "essential facilities" cases, involved circumstances clearly not present here. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985), involved a *termination* of a voluntarily created arrangement implemented through existing sales mechanisms (ski ticket sales offices), not deficiencies in creating a new arrangement through massive new ordering systems; it also involved a classic nonduplicable, natural-resource asset (a mountain) and, indeed, elimination of a distinct product (multi-mountain pass), not a claim to force a wholesale/retail separation, let alone at discounted prices. Likewise, in *Otter Tail*, 410 U.S. at 371, 378, the defendant power wholesaler was in fact wheeling power for other unaffiliated retailers; its "facilities depended upon exclusive government grants," as in *MCI* (L. Sullivan & W. Grimes, *The Law of Antitrust: An Integrated Handbook* 114 (2000)), but which are now barred (§ 253); and the only issue was a flat-out refusal of access, not terms whose adequacy would be tested in court.

[12] In 1999, AT&T, urging the FCC to reject an "essential facilities" approach to applying Section 251 access duties, explained that the doctrine did *not* reach these new access duties:

- The doctrine "assumes the continuation of a monopoly in the defendant's core market—the very circumstance Section 251 seeks to end."

local loop" demanded now was *not* voluntarily provided before 1996; this claim *is* about local markets, where entry is now positively invited, investments are no longer guaranteed recovery, and rival facilities are encouraged; and the specific terms of access are precisely what judges and juries are being asked to determine.

4. The Second Circuit's error in recognizing a broad new duty of affirmative assistance is a matter of Sherman Act law itself, but the 1996 Act bolsters the reasons for rejecting the Second Circuit's new duty. Prompt regulatory decision on the very claims of access at issue here is undisputedly

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- The doctrine "has been narrowly construed, and only very rarely applied, by the courts"; more generally, Section 2 duties are "[i]n sharp contrast to *** [Section 251's] obligation to provide non-discriminatory access to network elements on an unbundled basis ***. The purpose of Section 251 is to eliminate local exchange monopolies that were *not* declared unlawful under the antitrust laws, and that were *not* held to be required under the essential facilities doctrine (or any other antitrust doctrine) to provide their potential local competitors with access to their facilities."
- The doctrine "has never been used to require a monopolist to provide access to an essential facility simply to permit others to compete in the same market" and "cannot be used to pry open regulated monopolies to competition. Instead, that objective is the traditional province of agency-adopted regulation[.] *** [A] nondiscriminatory access mandate generally requires continuing regulation of the terms and conditions on which the monopolist provides access to competitors—a task 'for which both the federal courts and the antitrust litigation process are extremely ill-suited' ***."

Comments of AT&T at 47 & n.77, 50, 51-52, in *Local Competition* proceeding, CC Docket No. 96-98 (filed May 26, 1999), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6007444999. The FCC embraced the analysis, noting particularly that the 1996 Act requires UNE access at "cost-based rates, whereas the essential facilities doctrine allows monopolists to continue charging monopoly rates for use of their facilities." *UNE Remand Order*, 15 FCC Rcd 3696, ¶ 60 (1999), *remanded* in *United States Telecom Ass'n*, *supra*.

available under the 1996 Act, in sharp contrast to the situation in *MCI* and in *Otter Tail*.[13] That fact, plain on the face of the statute, eliminates the risk that a truly competition-harming problem would escape rapid correction (the problem in this case was corrected in a few months). And the public record of the comprehensive, aggressive implementation of the 1996 Act regime is beyond dispute.

In these circumstances, the particular regulatory regime is an important reason for not expanding antitrust sharing duties. *Goldwasser* so held, explaining that, with the 1996 Act regime in place, there was no real potential for true market harms for antitrust to address. *See* 222 F.3d at 401. And the principle is central to the First Circuit decision in *Town of Concord*. Relying critically on the proposition that a regulatory regime, even if not providing immunity from otherwise-applicable antitrust duties, can play a central role in determining whether there is a cognizable antitrust duty in the first place, the First Circuit reversed a verdict and rejected a Section 2 claim of price squeeze, as a matter of law, in an industry where both the wholesale and retail levels were regulated, explaining that regulation "dramatically alters the calculus of antitrust harms and benefits" and "significantly diminishes the likelihood of major antitrust harm," so that "the relevant antitrust considerations differ significantly, in

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[13] Regarding *Otter Tail*, the Second Circuit itself mentioned this critical difference (which determines whether the regime puts the "access" keys in competitors' pockets). In *Otter Tail*, "the Federal Power Commission was *not* permitted under the Federal Power Act to order" the access at issue (App. 35a (emphasis added)), whereas such regulatory power under the 1996 Act is undisputed, and indeed the 1996 Act guarantees a prompt, judicially reviewable ruling on access claims. *See* IIIA Areeda & Hovenkamp, ¶ 722, at 181. Regarding *MCI*, the significant regulatory fact was that AT&T could decide what it would do or not do without initial regulatory review and no guarantee of prompt regulatory review at all. *MCI*, 708 F.2d at 1093-99, 1103 (reciting decade-long proceedings in FCC).

degree and in kind." 915 F.2d at 25, 28.[14] The Second Circuit's only response to *Town of Concord* was to state that the decision came after trial. App. 37a n.17. But *Town of Concord* hardly relies on any *trial* on the effectiveness of the regulatory regime; to the contrary, the opinion relies entirely on publicly available legal and economic materials, with no citation to any record of a regulatory-effectiveness trial. The same approach should apply here.

Treating the 1996 Act's comprehensive regime as counting against adoption of a new antitrust duty accords with general principles of statutory construction. Wholly apart from any "implied repeal" principle, this Court has looked to later-enacted, specific statutes to reject invocations of earlier, more general statutes that had not previously been extended to the situation (and did not unavoidably cover it) where there was potential for incompatibility. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-82 (1989) (rejecting broad reading of 42 U.S.C. § 1981 to avoid "undermin[ing] the detailed and well-crafted procedures" of Title VII); *United States v. Fausto*, 484 U.S. 439, 453 (1988); *cf. J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593, 601 n.9 (2001) (discussing *Romani*). The judicial duty to harmonize statutes where possible supports *declining*

[14] The rationale has been recognized elsewhere as well. *See, e.g., Almeda Mall*, 615 F.2d at 354; *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, J.) ("[T]he proper role of antitrust courts is to accommodate the peculiar circumstances under which regulated entities operate. * * * '[A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.'") (quoting Areeda treatise), *modified*, 1982 WL 11277 (9th Cir.).

to expand an old, general provision in ways that would interfere with the newer, more specific one. Indeed, the 1996 Act's savings clause (47 U.S.C. § 152 note, App. 103a) indicates that previously recognized limits on Section 2 assistance duties were *not* altered by the Act's creation of new assistance obligations.

Here, a new antitrust duty, administered through discrete jury determinations and treble-damages awards, could readily impair the 1996 Act regime. As just one example: That regime contemplates a *balance* by FCC and state policymakers to ensure, among other things, that too much sharing and dependency do not actually reduce independent investment, *see* note 1, *supra*, and the task of maintaining and adjusting that balance cannot be performed if juries may impose treble-damages liability judging "reasonableness." More generally, the decisionmaking of all participants in regulatory processes–including the regulators, the incumbents, the competitors–will be skewed by the availability of antitrust liability, and treble damages, on the very same topics. *See Goldwasser*, 222 F.3d at 401; *Covad*, 201 F. Supp. 2d at 133-34.

B. The Second Circuit Decision, In Conflict With Other Circuits, Improperly Endorses "Monopoly Leveraging" As A Section 2 Theory

The Second Circuit decision presents a conflict over "monopoly leveraging" as a basis for Section 2 liability. Two other circuits have squarely rejected monopoly leveraging, while one other has embraced it. *Compare Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992) *and Alaska Airlines*, 948 F.2d at 548 (9th Cir.) *with Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135, 136-38 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989). Still other circuits have criticized monopoly leveraging in rejecting claims on grounds obviating the need to decide the issue. *See Intergraph Corp.*

v. Intel Corp., 195 F.3d 1346, 1359-60 (Fed. Cir. 1999); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (per curiam; panel including now-Justice Ginsburg); *see also Eleven Line, Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198, 206 n.16 (5th Cir. 2000) (recognizing "split"); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc.*, 63 F.3d 1540, 1551 n.8 (10th Cir. 1995) (same).

Using a monopoly to "gain a competitive advantage" (App. 30a) provides no separate ground of Section 2 liability for unilateral conduct, which the statute condemns only when it amounts to monopolizing or attempting to monopolize a market. Those requirements serve an important antitrust policy: protecting against consumer-harming challenges to superior efficiency from integration or superior aggressiveness. This Court, accordingly, has declared that Section 2 condemns unilateral conduct "*only* when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (emphasis added).[15] The Second Circuit's resuscitation of "monopoly leveraging" cannot be squared with *Spectrum Sports* or the statute.

[15] It is longstanding policy of the Antitrust Division not to recognize monopoly-leveraging claims. *See* William J. Kolasky, Deputy Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice, *North Atlantic Competition Policy: Converging Toward What?*, address dated May 17, 2002 ("[I]t is not unlawful for a firm with a monopoly in one market to use its monopoly power in that market to gain a competitive advantage in neighboring markets, unless by so doing it serves either to maintain its existing monopoly or to create a dangerous probability of gaining a monopoly in the adjacent market as well."), available at http://www.usdoj.gov/atr/public/speeches/11153.pdf.

II. THE STANDING RULINGS SHOULD BE REVIEWED

Respondent and the plaintiff class were not customers of Verizon, but customers of Verizon's customer AT&T, *i.e.*, indirect purchasers, and they complain of harm (to their AT&T phone service) derivative of harm to the direct customer. The Second Circuit nevertheless found standing, in conflict with this Court's and other circuits' rulings, even where (for the Communications Act) only AT&T's substantive legal rights were being invoked. The ruling abrogates both the requirement of *direct* injury and the normal bar on third-party standing, and it promises a dangerous expansion of litigation, not only but particularly in the communications context: for the first time, incumbent carriers (which by law must engage in massively detailed and complex sales to their competitors) must bear the burden of separate suits from their customer's customers (here filed as a class action), even where the carrier and its direct customer have committed disputes to cost-saving non-judicial resolution. The net result is virtual universal standing, contrary to *United States v. Western Elec. Co.*, 900 F.2d 283, 310 (D.C. Cir. 1990) (rejecting consumer standing, as virtually universal, to challenge AT&T decree modifications).

The Second Circuit's recognition of both antitrust standing and Communications Act standing violates the longstanding principle that federal statutes are generally read not to afford standing to those injured only indirectly. *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (Holmes, J.) ("The general tendency of the law * * * is not to go beyond the first step."). This "requirement" demands a "direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [are] generally said to stand at too remote a distance to recover." *Holmes v. Securities*

Investor Prot. Corp., 503 U.S. 258, 268-69 (1992). The requirement is embodied in, not abrogated by, the standard "any person * * * injured" language of suit-authorizing provisions for, *e.g.*, RICO, 18 U.S.C. § 1964(c), and the antitrust laws, 15 U.S.C. § 15. *Holmes*, 503 U.S. at 267 n.13; *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983) (*AGC*) (citing *Darnell-Taenzer*). It is specifically reflected in the indirect-purchaser bar in antitrust law. *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The language of Communications Act §§ 206 and 207 is no different. Thus, the alleged injury here should have been barred as indirect, deriving from harm to the direct customer.[16]

For antitrust standing, the Second Circuit noted that the direct customer, AT&T, also competes with Verizon, but that dual status does not change indirectness of the asserted injury into directness. The fact remains that respondent's sole claimed injury (poor local phone service *from AT&T* caused by Verizon's allegedly deficient assistance to AT&T) was derivative of harm to AT&T. Moreover, although the Second Circuit relied on this Court's decision in *Blue Shield v. McCready*, that decision does not depart in statement or

[16] Other factors reinforce indirectness as a bar here, and indicate why any essential-facilities claims are properly limited to the competitor/customer. The direct customer is a better plaintiff to challenge any deficient assistance; there are obvious difficulties in determining how much if any of the alleged deficiency was passed through by the direct customer and how much of the compensation received by the direct customer (AT&T) was then passed through; and the asserted harm–lost business from impaired telephone service–is intrinsically speculative. *See Holmes*, 503 U.S. at 269-70; *AGC*, 459 U.S. at 541. Even the indirect-purchaser bar cannot be limited to overcharges, because reduced quality is inseparable from excessive prices. *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998); *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993).

holding from the direct-causation requirement: the plaintiff's injury was *direct*–defendant refused to pay her. And the ruling here conflicts with decisions of other circuits denying antitrust standing to customer's customers asserting indirect injury.[17]

For the Communications Act, the Second Circuit's discussion simply confused "distinctness" of an alleged loss with the required directness of the causal connection. That confusion leaves "directness" with no discernible meaning, for different parties' losses will routinely be "distinct." Indeed, the Second Circuit's ruling conflicts with this Court's decisions finding distinct injuries nevertheless indirect.[18]

The Second Circuit's allowance of standing under Communications Act §§ 206 and 207 suffers from a second, independent flaw. A bedrock prudential standing rule is that persons injured by defendant's conduct can assert only their own legal rights, not another person's. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The Second Circuit holding that the rule is overriden by run-of-the-mill language authorizing

[17] *See Laurel Sand*, 924 F.2d at 543-44 (4th Cir.) (customer of railroad seeking trackage rights from defendant railroad denied standing); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 966-67 (3d Cir. 1983) (where plaintiff customer injured through retail dealer restricted by upstream defendant manufacturer, no standing even to challenge conspiracy between manufacturer and other retailers competing with plaintiff); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 17-19 (1st Cir. 1979) (where plaintiffs (Durham, Watercraft) injured as business customers of distributor ESI, by injury to ESI inflicted by its suppliers and their co-conspirators, no standing); *see also Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc.*, 919 F.2d 1517, 1520-21 (11th Cir. 1990) (buyer from manufacturer denied standing to sue supplier of credit to manufacturer).

[18] *See Holmes*, 503 U.S. at 262-63 (conspiracy caused broker-dealers' losses (excessive prices), derivatively causing harm to customers (loss of assets)); *AGC*, 459 U.S. at 540-41 (conspiracy coerced landowners to choose nonunion contractors, derivatively harming union (lost dues)).

injured persons to sue (as in §§ 206, 207) leaves virtually nothing to the background rule, contrary to other circuits' reliance on it to deny standing under similarly broad statutes. *E.g.*, *Flittie v. Solem*, 827 F.2d 276 (8th Cir. 1987) (42 U.S.C. § 1983); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308-09 (9th Cir. 1982) (42 U.S.C. §§ 1981-1983, 2000d).

The court of appeals cited no distinctive language, and no legislative history, to support its allowance of third-party standing. It cited a statement in *L.T. Barringer*, 319 U.S. at 13, about the Interstate Commerce Act (ICA), but the statement was *not* about the cause-of-action provision of the ICA at all (§ 8), the predecessor of Communications Act §§ 206, 207, but about a *substantive* ICA provision, and did not purport to authorize suits on others' substantive rights. To the contrary, this Court in *Darnell-Taenzer*, an ICA § 8 case, ruled that a customer is "the only one" who can sue to vindicate its ICA rights.[19] The same conclusion should apply here. *See Central Office*, 524 U.S. at 221-22, 227 (drawing on ICA in Communications Act case).

III. THE ISSUES PRESENTED SHOULD BE REVIEWED NOW

The Second Circuit's dramatic change in legal standards governs all firms subject to monopoly accusations. The legal issues presented are capable of resolution on the present record, and the recurrence of and conflicts over the issues, and the broad sweep of the rulings, substantive and standing, support immediate review. The Second Circuit's rulings will harmfully skew marketplace behavior while they remain the governing law in the commercially important Second Circuit, where many firms can be sued.

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[19] *Darnell-Taenzer*, 245 U.S. at 534 ("The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum.").

A. No Further Record Is Needed

The complaint rests entirely on alleged deficient provision of affirmative assistance on precisely the subjects covered by the 1996 Act. It is a legal question whether the allegations, if proved, could constitute unlawful conduct under Section 2 of the Sherman Act [20]; indeed, that is the precise legal question that the Seventh Circuit decided in *Goldwasser* on a motion to dismiss. It is also a legal question whether a customer's customer may rely on its derivative injury, and the direct customer's rights, to sue; indeed, in *AGC*, this Court found lack of standing on a motion to dismiss.

No further factual materials are needed to conclude that the complaint is legally insufficient. The relevant materials for analyzing the doctrinal and policy questions—including the limits on prior duties to deal with rivals and the reasons for those limits, as well as the critical features of the relevant regulatory context, and the law on customer's customer standing—require no factual record development. *Cf. NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (ordering dismissal of sole antitrust theory presented to Court); *AGC*, *supra* (dismissal); *United States v. National Ass'n of Secs. Dealers, Inc.*, 422 U.S. 694 (1975) (dismissal, based on legal and publicly available materials). And the sufficiency of the record to decide the legal questions actually presented cannot be defeated by positing different, unmade allegations that might require further factual development. *AGC*, 459 U.S. at

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[20] *See SmileCare Dental Group v. Delta Dental Plan of Calif., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996) (whether a type of conduct is anticompetitive is a question of law); II Areeda & Hovenkamp, ¶ 307c at 68-72 (2d ed. 2000); Areeda, *Essential Facilities*, 58 Antitrust L.J. at 851 (*legal* determination required in defining any duty of assistance to rivals: "Ad hoc policy decisions by juries provide no guidance to business actors, subject similar firms or markets to different rules, and lodge national economic policy in unqualified hands. * * * [J]udges, not juries, must decide what kinds of facilities one is entitled to keep for oneself.").

526 ("It is not * * * proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.").

B. Deferring Review Would Create Substantial Harm

Until corrected, the Second Circuit's broad legal standards will not only leave disuniformity among the circuits but foster burdensome and unjustified litigation, with well-recognized harms. Antitrust cases are notoriously expensive, even considered one at a time.[21] Here, the litigation is multiplying, and likely to proliferate further, against Verizon and other incumbent local telephone companies,[22] using the new weapons for suing over the routine disputes about the complex terms of assistance provided in hundreds of

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[21] *AGC*, 459 U.S. at 528 n.17 (demanding sufficient allegations before allowing "potentially massive factual controversy to proceed"); *DM Research, Inc. v. College of Amer. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("the price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition."); Werden, 32 St. Louis U.L.J. at 474 ("Section 2 suits are very expensive").

[22] Following the Second Circuit's decision, Verizon and other incumbent local telephone companies have been subjected to no fewer than 25 class actions in New York, Connecticut, Georgia, and Colorado, adding to pending suits by disappointed competitors in other jurisdictions. The litigation will predictably mount. "The goal * * * is to turn the Bells into the next asbestos or tobacco companies." Jeremy Feiler, *Verizon Battles Antitrust Suits*, Phil. Bus. J., July 12, 2002, at 3 (quoting Daniel Berninger, Telecom Antitrust Intelligence Report); *see* Editorial, *Son of Frankentobacco*, Wall St. J., Aug. 23, 2002, at A12 ("'The people that will drive this process will be, essentially, ambulance chasers,' Pulver.com's Dan Berninger recently boasted * * *. 'The same people that drive malpractice and asbestos suits.'").

agreements under the 1996 Act. The decision in this case has already been followed outside the Second Circuit,[23] and beyond the telecommunications industry.[24] And all of this litigation is not only costly to the parties and legal system, but deeply risky for any business, if standards are no more predictable in their application than "reasonable access" (App. 29a) or "'reasonable'" discrimination (App. 12a), as determined by juries.

The very threat of these costs and risks will harm the efficiency goals of antitrust and communications policy. As a former Antitrust Division head has explained, risky and burdensome antitrust suits can "have significant anticompetitive consequences."[25] "[I]t is not always necessary to win cases in order to blunt a rival's competitive weapons. Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors."[26] The same anticipated result can be exploited by the short-term perspective of class-action plaintiffs and their counsel, harming investments with longer term competitive benefits. The Second Circuit ruling will distort the

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[23] *See, e.g., Covad v. BellSouth, supra* (11th Cir.); *Ohio Bell Tel. Co. v. CoreComm Newco, Inc.*, 214 F.Supp.2d 810, 815-18 (N.D. Ohio 2002).

[24] The decision here was relied on to allow 16 consumer class actions to go forward against United Parcel Service on essential-facilities and monopoly-leveraging theories, *In re EVIC Class Action Litigation*, 2002 WL 1766554, at *12-*14 (S.D.N.Y. July 31, 2002), and to permit the Yankees baseball channel to challenge terms of access offered by a cable company, *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 2002 WL 31010490, at *10-*13 (S.D.N.Y. Sept. 4, 2002).

[25] Snyder & Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 552 (1991).

[26] Baumol and Ordover, *Use of Antitrust To Subvert Competition*, 28 J.L. & Econ. 247, 254 (1985); *see id.* at 264 ("Mere accusation and trial subjects the defendant firm to enormous expenses and even greater ex ante risks of an expensive adverse decision, even if it transpires ex post on the basis of convincing evidence that it is completely innocent.").

marketplace conduct of all those subject to the rulings—not just in the telecommunications industry (where excess assistance furnished by incumbents to avoid the costs and risks of antitrust cases will drain funds from otherwise needed investments and deter rivals' independent investments), but in other industries where monopoly (or attempted monopoly or leveraging) accusations can be made. This Court can and should review and correct the Second Circuit's rulings now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 1, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 01-7746

LAW OFFICES OF CURTIS v. TRINKO, L.L.P.,
individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

BELL ATLANTIC CORPORATION,
Defendant-Appellee.

Argued: Jan. 10, 2002.
Decided: June 20, 2002.
Amended: Aug. 14, 2002.
Errata Filed: Aug. 30, 2002.

Before: SACK, KATZMANN, and FLETCHER,* *Circuit Judges*.

Judge SACK concurs in part and dissents in part in a separate opinion.

KATZMANN, *Circuit Judge*.

This is an appeal of a dismissal of a class action brought on behalf of a class consisting of customers who received local phone service in the region served by Bell Atlantic from a company other than Bell Atlantic.[1] In recent years, the federal government has changed its policy with respect to the structure of local phone service markets, which had been

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* The Honorable Betty Fletcher, Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

[1] Bell Atlantic later merged with GTE Corporation to form Verizon Communications.

controlled by state-sanctioned local monopolies. Congress sought to introduce competition to those markets by passing the Telecommunications Act of 1996 (the "Telecommunications Act"), Pub.L. 104-104, 110 Stat. 56, which amended the Communications Act of 1934 (the "Communications Act"), 47 U.S.C. § 151, *et seq*. The Telecommunications Act requires the carrier with the local phone service monopoly to provide competitors with access to its local network—infrastructure necessary to provide local service that is expensive to duplicate. The Telecommunications Act also sets forth procedures by which telecommunications carriers can negotiate an interconnection agreement, which provides for such access, that must ultimately be approved by state regulators.

The plaintiff claims that it was damaged when the defendant, Bell Atlantic, denied the customers of AT & T, the plaintiff's local phone service provider, equal access to its local network. The plaintiff filed an action alleging that this behavior: (1) violated section 202(a) of the Communications Act; (2) violated subsections (b) and (c) of section 251 of the Telecommunications Act; (3) violated section 2 of the Sherman Antitrust Act (the "Sherman Act"), 15 U.S.C. § 2; and (4) was a tortious interference with contract. The plaintiff sought damages and injunctive relief for the alleged violations of section 202(a) and subsections (b) and (c) of section 251 pursuant to sections 206 and 207 of the Communications Act. It also sought damages and injunctive relief for the alleged violation of section 2 of the Sherman Act pursuant to the Clayton Act, 15 U.S.C. § 15.

The defendant primarily contended and maintains on appeal that the plaintiff's section 202(a) and 251 claims should be dismissed because the plaintiff is not asserting its own rights but is asserting rights that belong to AT & T. The defendant argues that the complaint only alleges a breach of its interconnection agreement with AT & T and that such a breach should be remedied through the administrative

process. The defendant claims that allowing an antitrust action based on the plaintiff's allegations would disrupt the regulatory process established by the Telecommunications Act. The district court essentially agreed with these arguments and dismissed the plaintiff's action in its entirety. *See Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 123 F.Supp.2d 738 (S.D.N.Y. 2000).

For the following reasons, we affirm in part, vacate in part, and remand for further proceedings.

BACKGROUND

We review the district court's decision granting the defendant's motion to dismiss *de novo*, taking all factual allegations in the amended complaint as true and construing all reasonable inferences in favor of the plaintiff. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Conboy v. AT & T Corp.*, 241 F.3d 242, 246 (2d Cir. 2001).

I. The Market for Local Phone Service and the Telecommunications Act

Prior to 1982, AT & T had monopolies in the markets for long-distance phone service, local phone service, and telephone equipment. In that year, AT & T settled an antitrust suit by the United States and agreed to a consent decree that split it from its local subsidiaries in order to encourage competition in the long-distance and equipment markets. In contrast, local phone service markets were left in the hands of AT & T's former local subsidiaries, which were regulated as monopolies by the states and prohibited from entering the long-distance markets. The rationale for allowing monopolies in the local phone service market was the belief that having more than one local provider would lead to unwarranted duplication in the physical connecting wires through which local calls are transmitted. *See AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 413-14 (1999) (Breyer, J., concurring in part, dissenting in part).

Bell Atlantic and NYNEX were two such providers with monopolies in the local phone service markets. In August 1997, NYNEX merged into Bell Atlantic, creating one company that provides local phone service in New England, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia. Bell Atlantic controls the "local loop" in its territory. According to the plaintiff, the "local loop is the wireline—a twisted pair of copper wires, coaxial cable, fiber optic cable, or the like—that links the customer's premises to a central switching station," Compl. ¶ 21, from which calls are routed to their ultimate destination. "In plain English, loops are the wires that connect telephones to the switches that direct calls to their destination." *AT&T Corp. v. FCC*, 220 F.3d 607, 618 (D.C.Cir. 2000). The plaintiff alleges that currently a carrier needs access to the "local loop" in order to provide local service because the cost of building a new "local loop" is prohibitively expensive.

Recently, as noted above, national policy with respect to the desirability of allowing competition in the local phone service markets has changed dramatically. In 1996, Congress enacted the Telecommunications Act, which amended the Communications Act. Under the Telecommunications Act, states are no longer permitted to enforce laws that prohibit entry in a local phone service market. *See* 47 U.S.C. § 253(a). Moreover, the amendment imposes affirmative duties on any local phone service provider, or local exchange carrier ("LEC"), that encourage competition by, for example, requiring the LEC to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers. . . ." 47 U.S.C. § 251(b)(4). An incumbent local exchange carrier ("ILEC"), which is the carrier such as Bell Atlantic that had a monopoly in the local phone service market prior to the enactment of the Telecommunications Act, *see* 47 U.S.C. § 251(h)(1), has additional affirmative duties under the statute. Among other duties, upon the

request by another telecommunications carrier, the ILEC is required to provide interconnection with its network "that is at least equal in quality to that provided by the local exchange carrier to itself. . . ." 47 U.S.C. § 251(c)(2)(C).

The plaintiff subscribed for local phone service with AT & T. Pursuant to the Telecommunications Act, AT & T had requested interconnection with the ILEC in the area, NYNEX, which later merged into Bell Atlantic. Upon such a request, section 252 of the Telecommunications Act allows the ILEC and requestor to enter into a binding agreement governing the interconnection arrangement that must ultimately be approved by a state commission. AT & T and NYNEX entered into such an agreement, which the state commission approved. *See Order Approving Interconnection Agreement, Case 96-C-0723*, 1997 WL 410707 (N.Y.P.S.C. June 10, 1997). Section 16 of the interconnection agreement provides for dispute resolution procedures that are the "exclusive remedy for all disputes between NYNEX and AT & T arising out of this Agreement or its breach." *Id.* at *23, § 16. The agreement also allows for disputes to be submitted to federal and state regulatory agencies. *Id.*

Shortly after entering into the interconnection agreement, AT & T filed complaints with regulatory authorities concerning lost and delayed orders. On March 9, 2000, Bell Atlantic entered into a consent decree with the FCC, agreeing to resolve the problem promptly and pay $3 million to the United States and $10 million to AT & T and other competitors for their losses. The consent decree was dissolved in July 2000.

II. The Plaintiff's Action and its Dismissal by the District Court

Not long after the consent decree was entered, the plaintiff filed a complaint in the United States District Court for the Southern District of New York *(Sidney H. Stein, J.)* asserting

multiple actions against Bell Atlantic: (1) an action pursuant to sections 206 and 207 of the Communications Act, alleging that Bell Atlantic violated: (a) section 202(a) of the Communications Act, which prohibits common carriers from discriminating in rates or services in providing communications services and (b) its obligations as an ILEC under subsections (b) and (c) of section 251 of the Telecommunications Act; (2) an action pursuant to the Clayton Act, alleging that Bell Atlantic violated section 2 of the Sherman Act; and (3) a state law claim for tortious interference with contract.

The plaintiff, a limited liability partnership organized under New York law, alleges that Bell Atlantic has not afforded competing local exchange carriers ("CLECs") with equal access to its network. The plaintiff claims that as a result, it has received poor local phone service. The amended complaint alleges:

> Bell Atlantic has not afforded CLECs access to the local loop on a par with its own access. Among other things, Bell Atlantic has filled orders of CLEC customers after fulfilling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with Bell Atlantic.

Consequently, the plaintiff claims Bell Atlantic violated the various duties imposed on it as an ILEC by subsections (b) and (c) of section 251 of the Telecommunications Act and its duties as a common carrier under section 202(a) of the Communications Act. The amended complaint also alleges that Bell Atlantic's conduct had no valid business reason and was intended to exclude competition from the market "by making

it difficult for its competitors to provide service in the Local Phone Service market on the level that Bell Atlantic is able to provide to its customers in that market." Am. Compl. ¶ 52.

The plaintiff seeks class certification pursuant to Fed.R. Civ.P. 23(b) on behalf of the "customers of a company other than Bell Atlantic with respect to the provision of Local Phone Service in the Geographic Market at any time since March 10, 1996," Am. Compl. ¶ 28, who were damaged by Bell Atlantic's alleged conduct. The plaintiff seeks damages, including treble damages for its antitrust claims. Moreover, the amended complaint asks for injunctive relief "enjoining Bell Atlantic from providing access to the local loop market ... to providers of Local Phone Service other than itself on terms and conditions that are not as favorable as those enjoyed by Bell Atlantic. . . ." Am. Compl. at 16.

Bell Atlantic moved pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the complaint. The district court granted the motion with respect to the Communications Act and antitrust claims, and declined to retain jurisdiction over the state law claim.

In adjudicating the plaintiff's antitrust claim, the district court in its thorough opinion initially evaluated Bell Atlantic's argument that the plaintiff did not have standing to bring an antitrust action because the only damage it suffered was as an indirect purchaser of services from AT & T. The district court rejected this argument, reasoning that the plaintiff's alleged harm, "damages resulting from poorer service than [it] would otherwise have received had Bell Atlantic acted lawfully, . . . is wholly distinct from the harm suffered by [AT & T]." *Trinko*, 123 F.Supp.2d at 741. Although the plaintiff had standing to bring an antitrust action, the district court held that the plaintiff did not sufficiently allege the "willful acquisition or maintenance" of monopoly power by Bell Atlantic. The district court noted that even a monopolist does not have a general duty under the antitrust laws to cooperate with its competitors. Citing the Seventh Circuit's

decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the district court observed that "[t]he affirmative duties imposed by the Telecommunications Act are not coterminous with the duty of a monopolist to refrain from exclusionary practices." *Trinko*, 123 F.Supp.2d at 742. Characterizing the plaintiff's claim as solely an allegation that Bell Atlantic violated the Telecommunications Act, the district court found that such an allegation was insufficient to support an antitrust claim.

The district court also dismissed the plaintiff's Communications Act claims. Initially, the district court rejected Bell Atlantic's argument that the damages provisions of the Communications Act do not apply to the Telecommunications Act. The district court concluded that the Telecommunications Act was an amendment to the Communications Act and that private lawsuits are not generally incompatible with the regulatory scheme established by the Telecommunications Act. However, the district court dismissed the claims based on the doctrine of prudential standing, the judge-made rule that prevents a third party from asserting the rights of others. The district court reasoned that section 251 of the Telecommunications Act "imposes duties on incumbent carriers only as to local competitors, and those rights are triggered only when a competing carrier requests interconnection." *Trinko*, 123 F.Supp.2d at 744 (citation omitted). Therefore, a suit brought by the plaintiff alleging violations of section 251 would impermissibly assert the rights of Bell Atlantic's local competitor, AT & T. Similarly, the district court explained that section 202(a) of the Communications Act only imposes duties on a carrier with respect to its own customers. *See id.* Thus, the district court concluded that only Bell Atlantic's customers have a right to bring suit under section 202(a), barring the plaintiff, which is a customer of AT & T, from bringing suit. The district court dismissed the plaintiff's section 202(a) claim without prejudice, allowing the plaintiff to replead its claim within 20 days. Finally,

because the district court dismissed all of the plaintiff's federal claims, it declined to retain supplemental jurisdiction over the plaintiff's state law tortious interference claim.

The plaintiff then moved for reconsideration of the district court's decision. While the district court denied the motion, it allowed the plaintiff to replead its antitrust claim in addition to its section 202(a) claim. In its amended complaint, the plaintiff attempted to retool its section 202(a) claim to avoid the assertion of a third party's rights. The plaintiff alleged that it had a direct relationship with Bell Atlantic because AT & T acted as the plaintiff's agent with respect to Bell Atlantic.[2] The plaintiff also characterized its antitrust claim as a monopoly leveraging claim. Bell Atlantic again filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and the district court granted the motion. The district court rejected the plaintiff's amended section 202(a) claim because the plaintiff failed to allege facts establishing a principal-agent relationship. The district court also concluded that there was no antitrust claim because the amended complaint did not describe anticompetitive conduct and only alleged that Bell Atlantic breached its own contracts with competitors.

The plaintiff filed a timely notice of appeal and this appeal ensued.

DISCUSSION

I. The Communications Act Claims

A. General Principles of Standing

We first address the district court's dismissal of the plaintiff's Communications Act claims through application of the prudential standing doctrine. We review a district court's dismissal of a complaint for lack of standing *de novo*. *See Wight v. Bankamerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000).

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[2] The plaintiff did not assert this theory on appeal.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted); *accord Lamont v. Woods*, 948 F.2d 825, 829 (2d Cir. 1991). Both limits are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498 (citations omitted). The constitutional dimension of the standing doctrine originates from Article III of the Constitution, which confines federal courts to adjudicating "cases" and "controversies." To meet the constitutional test for standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citation omitted).

It is undisputed that the plaintiff meets the constitutional limits of standing. The issue is whether the plaintiff satisfies the judge-created prudential requirements of standing. "Foremost among the prudential requirements is the rule that a party must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Wight*, 219 F.3d at 86 (quoting *Warth*, 422 U.S. at 499). "[T]he source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing. . . . Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500; *accord Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 185 (2d Cir. 2001). Thus, the issue is whether the plaintiff has a right to judicial relief under sections 206 and 207 of the Communications Act for

alleged violations of section 202(a) of the Communications Act and subsections (b) and (c) of section 251 of the Telecommunications Act.

B. Sections 206 and 207 of the Communications Act

The district court assumed that the plaintiff's rights under the Communications Act could only arise from duties defined by the substantive provisions of the Act. Because the plaintiff could not identify a duty to it arising directly from sections 202(a) or 251, the district court held that the plaintiff was impermissibly attempting to assert the rights of third parties.

In determining whether the plaintiff has a right under the Communications Act, the proper focus is not sections 202(a) or 251, but the Act's liability and damages provisions, sections 206 and 207. The plaintiff's right to bring an action under the Communications Act originates from sections 206 and 207 of that Act. Section 206 makes a common carrier "liable to the person or persons injured" as a result of the common carrier's violation of the Communications Act. 47 U.S.C. § 206.[3] Section 207 gives the person damaged by the common carrier's violation of the Act the right to bring an action in federal court. *See* 47 U.S.C. § 207.[4] Sections 206

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[3] Section 206 provides in full:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206.

[4] Section 207 provides in full:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the

and 207 are broadly written and explicitly encompass all of the substantive provisions of the Communications Act. While a particular substantive provision may not provide the plaintiff with a particular right, if the violation of that provision injures the plaintiff, sections 206 and 207 of the Communications Act confer upon the plaintiff the right to bring an action to recover for its injuries.

C. Section 202(a) of the Communications Act

The plaintiff alleges that the defendant violated section 202(a) of the Communications Act. Section 202(a) provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a). "An inquiry into whether a carrier is discriminating in violation of § 202(a) involves a three-step inquiry: (1) whether the services are 'like'; (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable." *Competitive Telecomm. Ass'n v. FCC*, 998 F.2d 1058, 1061 (D.C.Cir. 1993); *see also National Communications Ass'n, Inc. v.*

Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207.

AT & T, 238 F.3d 124, 127 (2d Cir. 2001) (assuming that this three-step inquiry applies in this Circuit). "[T]he Congressional concern in enacting . . . § 202(a) specifically, was to eliminate the use of monopolistic power to stifle competition." *National Communications*, 238 F.3d at 131 (citations omitted).

The discrimination described in the complaint suffices to state a claim under section 202(a). In *National Communications Ass'n, Inc. v. AT&T*, we upheld a finding of discrimination under section 202(a) where a telecommunications carrier favored its own end-user customers over resellers. 238 F.3d 124, 127-28 (2d Cir. 2001). The plaintiff has also alleged that CLECs such as AT & T obtaining services under the resale provisions of § 251 received telecommunications services inferior to those supplied to the defendant's own end-users.

Although the plaintiff alleged a cognizable form of discrimination by the defendant, the district court dismissed the plaintiff's section 202(a) action based on the doctrine of prudential standing. In doing so, the district court assumed that the plaintiff's right to bring suit under the Communications Act originates from section 202(a). While the text of section 202(a) broadly prohibits discrimination against "any particular person, class of persons, or locality," 47 U.S.C. § 202(a), the district court characterized section 202(a) as only creating a duty between a communications provider and its direct customer. The district court concluded that the plaintiff has no action under section 202(a) because it was not a direct customer of Bell Atlantic, and was instead a customer of AT & T, which was a customer of Bell Atlantic. Under the district court's theory, only AT & T would have a section 202(a) action against Bell Atlantic.

But as we explained earlier, the plaintiff's right to sue does not stem from section 202(a). It originates from sections 206 and 207, which makes parties who violate the Communications Act liable to parties they injure through such violations.

Bell Atlantic does not dispute on appeal that there is arguably a violation of section 202(a) with respect to its dealings with AT & T. The plaintiff alleges that it was injured by this violation of the Communications Act because it received poor local phone service. As an entity that contends that it was injured by Bell Atlantic's alleged violation of section 202(a), the plaintiff plainly meets the requirements for having an action under sections 206 and 207. The plaintiff is asserting its own rights. Therefore, the district court erred in dismissing the case based on the doctrine of prudential standing.

To support its argument for dismissal, the defendant points to the absence of published cases involving actions by indirect purchasers allegedly injured by railroad rates that were regulated by the now repealed Interstate Commerce Act ("ICA"). Because "[s]ections 206 and 207 of the Communications Act were expressly modeled on the enforcement provisions of the ICA," this Court has "held that decisions construing the ICA are persuasive in establishing the meaning of the Communications Act. . . ." *Conboy*, 241 F.3d at 250; *see also AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998); H.R.Rep. No. 73-1850, at 6 (1934).[5]

Although we have found no indirect purchaser case brought under the ICA, the defendant does not point to any authority barring such a suit. In light of the unambiguous language of sections 206 and 207, the absence of such a case

[5] Prior to passage of the Communications Act, the communications industry was regulated by the ICA. In 1910, Congress extended regulation to communications common carriers through the Mann-Elkins Act, which amended the ICA to bring such carriers under the jurisdiction of the Interstate Commerce Commission. In 1934, the Communications Act created the FCC to regulate the communications industry. *See Iowa Utils. Board*, 525 U.S. at 403-04 (Thomas, J. concurring in part and dissenting in part); Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose, in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 3 (Max D. Paglin, ed., 1989).

is insufficient to establish that such an action is not permitted. Moreover, the Supreme Court did state in *L.T. Barringer & Co. v. United States*, 319 U.S. 1, 13 (1943), that shippers, who tend to be the parties most directly injured by discriminatory rates, were not the only entities that could bring actions for discriminatory rates under the ICA. The discussion in *L.T. Barringer* is consistent with the language of sections 206 and 207, which provides that any party injured by conduct that violates the Communications Act has the right to bring an action.

Bell Atlantic contends that the plaintiff cannot bring suit because its injury is wholly derivative of the injury suffered by AT & T. In the RICO context, it is well-established that a plaintiff must establish that the defendant's conduct was a proximate cause of its injury in order to have standing to bring a RICO action. *See Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 267-70 (1992); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234 (2d Cir. 1999). We have noted that "to plead a direct injury is a key element for establishing proximate causation. . . ." *Laborers Local*, 191 F.3d at 235. But we have not held that sections 206 and 207 of the Communications Act contain a requirement of proximate cause. We need not resolve the difficult issue of whether there is such a requirement, however, because on this record the plaintiff sufficiently alleges that it suffered a direct injury. In discussing the question of antitrust standing, the district court found that "[t]he harm that these customers are alleging—damages resulting from poorer service than they would otherwise have received had Bell Atlantic acted lawfully—is wholly distinct from the harm suffered by the competitors." *Trinko*, 123 F.Supp.2d at 741. The plaintiff alleges that it suffered a direct harm, poor phone service, as a result of the defendant's mis-

conduct.[6] While the district court may find otherwise after discovery and a motion for summary judgment, it is too early to conclude on this record that the plaintiff only suffered a wholly derivative injury.

Bell Atlantic asserts a number of other arguments for dismissal that the district court did not consider. Specifically, it claimed that the case should be dismissed under the filed rate doctrine and because the plaintiff has not pleaded specific damages. These are grounds that the district court did not address in its decision, which solely relied on the doctrine of prudential standing in dismissing the case, and we will not decide those issues in the first instance on this appeal.

We are of the view that the district court erred in dismissing the plaintiff's section 202(a) claim based on the doctrine of prudential standing. Because the discrimination described in the complaint would violate section 202(a) of the Communications Act and allegedly caused a direct injury to the plaintiff, the plaintiff is asserting its own rights under sections 206 and 207 of the Communications Act. We therefore reverse the district court's dismissal of the plaintiff's section 202(a) claim based on the doctrine of prudential standing.

D. Section 251 of the Telecommunications Act

The plaintiff's attempt to bring a claim for alleged violations of section 251 of the Telecommunications Act is problematic.[7] We agree that the claim should be dismissed

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[6] The defendant contends that the plaintiff essentially describes an overcharge claim, which only resulted in an indirect injury. While the plaintiff's alleged receipt of poor service means that it paid too much for the service it received, the plaintiff's claim for damages cannot be narrowly pigeon-holed into the category of an excessive charge. The plaintiff contracted for a basic level of adequate service with the expectation that it would receive such service. Instead, the defendant's misconduct allegedly disrupted these expectations, and perhaps damaged the plaintiff's business. Such allegations describe a direct injury.

[7] Subsections (a), (b), and (c) of Section 251 read:

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

but for different reasons than the district court gave.

The plaintiff alleges that the defendant violated its duties as an ILEC as defined by subsections (b) and (c) of section 251 of the Telecommunications Act. Section 251 seeks to open local telecommunications markets to competition. While section 251 establishes a number of broadly stated duties that can be construed as substantive norms of behavior, the Telecommunications Act allows an ILEC to substantially fulfill its duties under subsections (b) and (c) of section 251

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

47 U.S.C. §§ 251(a)-(c).

by entering into interconnection agreements with telecommunications carriers seeking to enter the local market. These agreements are reached primarily through a process of negotiation and must ultimately be approved by a state commission. The parties may ask the state commission to arbitrate any disputes that arise in the negotiating process. After the state commission approves such an agreement, the Telecommunications Act intends that the ILEC be governed directly by the specific agreement rather than the general duties described in subsections (b) and (c) of section 251.

In this case, AT & T and Bell Atlantic have negotiated an interconnection agreement. During this process they submitted a number of issues to the state commission for arbitration. Those disputes were resolved and the entire agreement has been approved by the state commission. This agreement provides for a dispute resolution mechanism that the parties have utilized. At best, the plaintiff's section 251 claim only describes conduct by the defendant that would violate the interconnection agreement. Therefore, the plaintiff has no cause of action pursuant to sections 206 and 207 of the Communications Act for injury stemming from a violation of section 251.

Initially, we note that the district court was correct in concluding that section 251 defines duties between telecommunications carriers. It is clear that the duties enumerated in section 251 regulate the relationships between telecommunications carriers, especially those that are seeking to enter the market for local phone service, rather than the relationships between telecommunications carriers and consumers. In fact, the Committee Report notes that section 251 "imposes a general duty to interconnect directly or indirectly *between all telecommunications carriers*. . . ." H.R. Conf. Rep. 104-458, 1996 WL 46795, at *121 (1996) (emphasis added). While the Telecommunications Act and legislative history often refer to the fact that consumers will ultimately benefit from competitive communications markets, that is only a collateral

effect of the implementation of these duties by telecommunications carriers.

It could be argued that if the plaintiff has a right to bring suit for a violation of the Telecommunications Act, such a right would arise from sections 206 and 207 of the Communications Act. On this view, if the plaintiff has such a right, the district court's dismissal of the plaintiff's section 251 claim based on the doctrine of prudential standing would have been in error. However, we need not reach the issue of whether the plaintiff has the right under sections 206 and 207 to bring suit for a violation of the Telecommunications Act because the plaintiff does not describe conduct by the defendant that would violate section 251 of the Telecommunications Act.

While the duties regulating ILECs enumerated in subsections (b) and (c) of section 251 appear at first glance to be free-standing, in practice, section 251 envisions that these duties will be implemented through state approved contracts between the carrier requesting interconnection and the ILEC. Section 251 requires the ILEC and requesting carrier to "negotiate in good faith in accordance with section 252 . . . agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection." 47 U.S.C. § 251(c)(1). In other words, an ILEC can meet its obligations under subsections (b) and (c) by entering into an interconnection agreement with a requesting carrier through the procedures outlined in section 252. Such interconnection agreements do not necessarily reiterate the duties enumerated in section 251. Instead, the ILEC and requesting carrier have the option of contracting around the obligations set forth in subsections (b) and (c) of section 251. Section 252(a)(1) of the Telecommunications Act provides: "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter

into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251. . . .*" 47 U.S.C. § 252(a)(1) (emphasis added).

Section 252 also provides for regulation of interconnection agreements by state commissions. For example, if there are disputes in the negotiation of an interconnection agreement, the parties can request arbitration by the state commission to decide any open issues. *See* 47 U.S.C. § 252(b)(1). The state commission is required to resolve such disputes through reference to section 251. *See* 47 U.S.C. § 252(c)(1). The state commission must also ultimately approve the interconnection agreement. In evaluating parts of an interconnection agreement for approval, the statute requires the state commission to use different criteria depending on whether the portion of the agreement was negotiated or arbitrated. The state commission may only reject negotiated portions of an interconnection agreement if they discriminate against a non-party telecommunications carrier or if the implementation of the agreement goes against the public interest. *See* 47 U.S.C. § 252(e)(2)(A). On the other hand, when parts of the interconnection agreement go through the arbitration procedure, the state commission may only reject an arbitrated portion of the agreement if it does not comply with section 251. *See* 47 U.S.C. § 252(e)(2)(B).

NYNEX, which later merged with Bell Atlantic to form the defendant, and AT & T used the procedures described in section 252 to enter into an interconnection agreement that was ultimately approved by the state. Because they disagreed on a number of issues, the parties submitted certain disputes to the New York Public Service Commission for arbitration. *See Order Approving Interconnection Agreement*, 1997 WL 410707, at *1. The New York Public Service Commission resolved the disputes and ultimately approved the agreement as compliant with section 251 and consistent with the public interest. *See id.* at *4.

The issue before us is whether conduct that breaches the defendant's interconnection agreement with AT & T can also be considered a violation of subsections (b) and (c) of section 251. We conclude that in this case it does not. Once the ILEC "fulfill[s] the duties" enumerated in subsection (b) and (c) by entering into an interconnection agreement in accordance with section 252, 47 U.S.C. § 251(c)(1), it is then regulated directly by the interconnection agreement. Moreover, the fact that the Telecommunications Act allows parties to negotiate interconnection agreements without regard to subsections (b) and (c) of section 251, *see* 47 U.S.C. § 252(a)(1), indicates that Congress envisioned the possibility that the negotiated parts of the interconnection agreement could result in a different set of duties than those defined by the statute. To read the Telecommunications Act in a way such that ILECs are governed exclusively by the broadly worded language of section 251 would make the option of negotiating interconnection agreements without regard to subsections (b) and (c) of section 251 superfluous.

The elaborate process of negotiation and arbitration set forth in section 252 indicates that Congress sought to allow ILECs and their competitors to govern their interconnection relationships directly through specific interconnection agreements rather than the broadly outlined duties described in subsections (b) and (c) of section 251. Interconnection agreements are necessary because the particular ways in which the broadly framed duties enumerated in section 251 are implemented may differ depending on the circumstances. Rather than primarily regulating the relationships between entering carriers and the incumbent ILEC through abstract duties enforceable in court, Congress chose to give the parties the option to negotiate particular agreements with the aid and ultimate approval of state regulatory bodies, which have specialized expertise in the area of telecommunications. This option offers telecommunications carriers the choice to use a regulatory process that might be more efficient than other

alternatives. If ILECs were governed by the abstract duties described in section 251 despite the existence of a particular interconnection agreement that was approved by the state commission after an extensive process of negotiation and arbitration, they would have diminished incentive to enter into such agreements. A requesting carrier could end-run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251.[8]

The particular interconnection agreement entered into by the defendant and AT & T requires the parties to resolve any disputes through procedures set forth in the agreement. We take judicial notice of the fact that the dispute between Bell Atlantic and AT & T arising out of the factual allegations in the complaint has been resolved through these procedures. The defendant fulfilled its duties as an ILEC under subsections (b) and (c) of section 251 by entering into a state approved interconnection agreement with AT & T through the procedures described in section 252. While the defendant may have breached its obligations under the interconnection agreement, because its duties as an ILEC are directly defined by that agreement, there was no underlying violation of

[8] Because the interconnection agreement in this case is closely linked to section 251 of the Telecommunications Act, the dissent argues that the defendant's failure to fulfill its obligations under the agreement may also support a right of action under 47 U.S.C. §§ 206 & 207, which may provide a right of action for violations of the Telecommunications Act. While it is true that the New York Public Service Commission found that the interconnection agreement in this case "does not violate the requirements of the Act," this finding was "subject to clarifications discussed below [in the text of the Commission's Order Approving Interconnection Agreement]." *See* Order Approving Interconnection Agreement, 1997 WL 410707, at *3. The Commission's language confirms that the particular form of the duties defined by the interconnection agreement in this case do not simply reiterate the general duties imposed by section 251.

subsections (b) and (c) of section 251.[9] Without an underlying violation of section 251, the plaintiff has no cause of action under sections 206 and 207, even if it were permitted to bring a suit for violations of section 251 pursuant to sections 206 and 207.[10]

II. The Antitrust Claim

Finally, we address the district court's dismissal of the plaintiff's antitrust claim. We agree that the plaintiff has standing to bring an antitrust claim. However, we reverse the district court's dismissal of the plaintiff's antitrust claim pursuant to Fed.R.Civ.P. 12(b)(6).

A. Standing

Initially, we review the district court's conclusion that the plaintiff has standing to bring an antitrust suit. The Clayton Act provides an action for "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." 15 U.S.C. § 15. To have standing to bring an action under the Clayton Act, the plaintiff must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Volvo N. Am. Corp. v. Men's Inter. Prof'l Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988) (internal quotations and citations omitted).

[9] The complaint does not allege that Bell Atlantic violated subsection (a) of section 251. Moreover, subsection (a) only requires basic interconnection and compatibility of standards. The complaint does not describe conduct by Bell Atlantic that would violate these duties.

[10] We stress that because this is a case where an interconnection agreement has been entered into by the parties and approved by the state, we do not decide whether a plaintiff can bring suit for a violation of the duties under section 251 when there is no such agreement. Moreover, we emphasize that our analysis is limited to section 251 of the Telecommunications Act and does not address other provisions of that Act.

The plaintiff alleges that it received poor local phone service because of Bell Atlantic's attempt to maintain its monopoly power by refusing to provide equal access to its local network. The defendant asserts that the plaintiff has no antitrust standing because it only suffered an indirect injury. According to the defendant, its alleged actions only directly injured its direct customer, AT & T. The plaintiff could only have been injured incidentally, through its purchase of inferior services from AT & T. The defendant thus contends that the plaintiff is essentially an indirect purchaser who cannot recover antitrust damages under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held that a customer of a customer who is overcharged by a monopolist does not have antitrust standing. The rationale for the *Illinois Brick* rule is that it is difficult to calculate the damages suffered by an indirect purchaser. *See id.* at 737- 47. The indirect purchaser is only damaged to the extent that the direct purchaser passes on to it the overcharge resulting from the anticompetitive conduct. Any such calculation would be imprecise and could result in double recovery if both the direct and indirect purchasers sue and the calculations in their suits differed.

The problem with simply applying the *Illinois Brick* rule to this case is that AT & T cannot be characterized solely as a customer of Bell Atlantic. While AT & T purchases access to the local network from Bell Atlantic, it is also a competitor of Bell Atlantic in the retail market for selling local phone service to consumers. Consequently, this is a case where the anticompetitive conduct has allegedly damaged the customer of a competitor who would have antitrust standing under *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). In *McCready*, the Supreme Court found that an individual who was denied coverage for treatment by a psychologist as a result of an alleged conspiracy between his health plan and a group of psychiatrists had antitrust standing. The defendants in that case alleged that the conspiracy only injured the competitors of the psychiatrists, the psychologists. The

Supreme Court, however, found that a customer of a competitor can suffer a direct injury from an anticompetitive scheme aimed principally at the competitor. To illustrate this principle, the Supreme Court used a simple example. As a result of the scheme to exclude psychologists from the market, the person seeking coverage for treatment by a psychologist has two choices: (1) visit a psychologist and not receive reimbursement; or (2) visit a psychiatrist. While the second choice hurts the psychologist in its role as a competitor of psychiatrists, the first choice directly hurts the customer of the psychologist. *See McCready*, 457 U.S. at 483-84. As a result of an alleged monopoly scheme, the plaintiff in this case had a similar set of choices: (1) stay with AT & T and receive inferior local service; or (2) switch to Bell Atlantic. While the second choice would hurt AT & T as a competitor, the first choice directly injures the plaintiff as a consumer. In this case, the plaintiff made the first choice and suffered the requisite antitrust injury.

The defendants in *Illinois Brick* were alleged price-fixers. *Illinois Brick* assumes a case where customers and customers of customers are only affected by the anticompetitive scheme through the imposition of prices higher than prices in a competitive market. In such a case, the only harm suffered by the customer of the customer is that part of the higher prices are passed on to it. In this case, Bell Atlantic was not simply charging higher prices, it was also allegedly trying to interfere with AT & T's opportunity to compete with it. Thus, there is more at stake here than the imposition of higher prices, which are indirectly passed on to others. There is allegedly conduct that is meant to drive a competitor out of the market. Action meant to injure a competitor can directly harm the consumer who chooses to do business with the competitor. In this case, allegedly the plaintiff was harmed directly when it received poor phone service because it chose to do business with AT & T.

The district court correctly concluded that the plaintiff has antitrust standing.

B. The Sherman Act Claim

Generally, a plaintiff can establish that a defendant violates section 2 of the Sherman Act by proving two elements "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Volvo N. Am. Corp.*, 857 F.2d at 73 (citations omitted); *accord Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998).

The district court dismissed the plaintiff's antitrust claim, finding that the plaintiff did not state a claim with respect to the second element. The district court reasoned that a monopolist does not have a general duty to cooperate with its competitors. Relying on *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the district court concluded that at most the plaintiff had only alleged that the defendant breached section 251 of the Telecommunications Act.

While it is true that a monopolist has no general duty to cooperate with its competitors, "[a] monopolist may not, of course, use its market power, whether obtained lawfully or not, to prevent or impede competition in the relevant market." *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988) (citations omitted). As the Supreme Court has explained:

> [t]he absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985). For example, a monopolist has a duty to provide competitors with reasonable access to "essential facilities," facilities under the monopolist's control and without which one cannot effectively compete in a given market. *See Southern Pac. Communications Co. v. AT&T*, 740 F.2d 980, 1009 (D.C.Cir. 1984) ("access to essential facilities [must] be afforded to competitors 'upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.'") (quoting *United States v. Terminal R.R. Assoc.*, 224 U.S. 383, 411 (1912)); *see also Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568-69 (2d Cir. 1990) (discussing essential facilities theory).

While it is clear that a plaintiff would not state an antitrust claim against a defendant simply by alleging that the defendant violated its duties under section 251, the plaintiff's antitrust claim does not merely allege that the defendant violated section 251. In fact, it does not mention section 251 at all. The allegations in the amended complaint describe conduct that may support an antitrust claim under a number of theories. While some of this conduct might also violate section 251, these are not merely allegations that section 251 has been violated.

First, the amended complaint may state a claim under the "essential facilities" doctrine. The plaintiff alleges that access to the local loop is essential to competing in the local phone service market, and that creating independent facilities would be prohibitively expensive. The defendant allegedly

has failed to provide its competitor, AT & T, reasonable access to these facilities.[11] The plaintiff claims it was injured when the local phone service it purchased from AT & T was disrupted as a result of this alleged violation of the antitrust laws.[12] Although the defendant may ultimately be able to show that the local loop is not an essential facility, or that it provided the plaintiff with reasonable access to the local loop, these are issues that the district court should consider in the first instance.

Second, the plaintiff may have a monopoly leveraging claim. To have such a claim, the plaintiff must show that the defendant "(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage ... in another distinct market; and (3) caused injury by such anticompetitive conduct." *Virgin Atl. Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001). The amended complaint alleges that the defendant has monopoly power over a wholesale market in which it sells access to the local loop to telecommunications carriers. It also alleges that the defendant used that power to gain a competitive advantage in a retail market in which telecommunications carriers sell local phone service to consumers. *See, e.g., M.A.P. Oil Co. v.*

[11] We do not suggest that any or every disruption in local phone service would support an essential facilities claim. For example, a minor, isolated, and accidental disruption in access to an essential facility would be insufficient as a matter of law to establish an antitrust violation. There must be sufficient evidence to conclude that the defendant controlling the essential facility denied or disrupted a competitor's access to that facility with the intention of maintaining its monopoly power.

[12] We observe that while the defendant must be a competitor of the entity to which it denies reasonable access to the essential facility for there to be a violation of section 2 of the Sherman Act, *see Official Airline Guides, Inc. v. Federal Trade Comm'n*, 630 F.2d 920, 926 (2d Cir. 1980), the Clayton Act, 15 U.S.C. § 15, provides a consumer plaintiff directly injured by such an antitrust violation with a cause of action regardless of whether the consumer plaintiff is a competitor of the defendant.

Texaco, Inc., 691 F.2d 1303, 1307 (9th Cir. 1982) (noting that distinct customers and distinct prices are factors useful in identifying a distinct market) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). Finally, the plaintiff alleges that it was injured by this anticompetitive conduct. Again, the defendant ultimately may be able to refute these claims on summary judgment, but we cannot resolve them on the merits at this stage of the litigation.[13]

In *Goldwasser*, the Seventh Circuit dismissed similar allegations of monopolistic conduct for two reasons. First, it found that the claim was "inextricably linked" to allegations by the *Goldwasser* plaintiff that section 251 of the Telecommunications Act had been violated. Thus, the claim was merely an allegation that the Telecommunications Act was violated and not a freestanding antitrust action. But there is no requirement that an allegation that otherwise states an antitrust claim must not rely on allegations that might also state a claim under another statute. Congress, of course, can indicate that such a statute provides an implicit immunity from the antitrust laws. Conduct that merely describes a violation of a statute that is meant to immunize a regulated

[13] The plaintiff has also asserted an attempted monopolization claim. To establish such a claim, a plaintiff must show that the defendant "(1) engaged in anticompetitive or predatory conduct with (2) specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *AD/SAT v. Associated Press*, 181 F.3d 216, 226 (2d Cir. 1999). This claim is derivative of the monopoly leveraging and essential facilities claims. If the plaintiff demonstrates that the defendant engaged in monopoly leveraging, or denied it reasonable access to an essential facility, then it has established the first element of the attempted monopolization claim that the defendant engaged in anticompetitive behavior. Based on our reading of the amended complaint, however, the plaintiff does not describe any additional predatory or anticompetitive conduct that would establish the first prong of an attempted monopolization claim. While on remand, the plaintiff may add allegations that would describe additional predatory behavior, at this point, the plaintiff has not established a separate attempted monopolization claim.

industry from antitrust scrutiny could not support an antitrust action. But we do not lightly find that a statute provides such an implicit immunity. Absent a "plain repugnancy," we will not assume that a regulatory statute implicitly repeals the antitrust laws. *See Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 82-83 (2d Cir. 1981). If there is no such implicit immunity, as long as a set of allegations states an antitrust action on its own terms, the fact that it closely resembles an action brought under another statute in itself is unproblematic.

There is no "plain repugnancy" between the antitrust laws and the Telecommunications Act. In fact, the purpose of the Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." H.R. Cong. Rep. 104-458, 1996 WL 46795, at *1 (1996); 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 162-63 (2000) ("The 1996 [Telecommunications] Act goes very far toward throwing all aspects of the industry open to competition and thus antitrust analysis."). Moreover, the Act contains a specific savings clause, which specifies that "nothing in this Act or the amendments made by this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152, Historical and Statutory Notes. The meaning of the statutory provision is plain on its face and must guide our analysis. *See Lebron v. Russo*, 263 F.3d 38, 41 (2d Cir. 2001) (per curiam). The savings clause unambiguously establishes that there is no "plain repugnancy" between the Telecommunications Act and the antitrust statutes. We thus find that the Telecommunications Act does not provide an "implicit immunity" from the antitrust laws.[14]

The *Goldwasser* court's conclusion also rested on the assumption that "[t]he antitrust laws would add nothing to the oversight already available under the 1996 law." *Goldwasser*, 222 F.3d at 401. But in this case, which involves an individual consumer seeking damages, the antitrust laws serve an important role. One of the purposes of the Clayton Act is "to compensate victims of antitrust violations for their injuries." *Illinois Brick Co.*, 431 U.S. at 746 (citation omitted). Because this plaintiff has no remedy under the Telecommunications Act for a violation of subsections (b) and (c) of section 251, the antitrust laws are the only place where it has a remedy for damage caused by the allegedly anticompetitive behavior described in the amended complaint. Thus, in this case, the antitrust laws serve the purpose of affording the consumer compensation that the Telecommunications Act does not provide.

The second reason the *Goldwasser* court gave for dismissing the suit was that allowing an antitrust suit based on allegations arising out of the alleged refusal of an ILEC to grant an LEC equal access to its network "would ... force us to confront the question whether the procedures established under the 1996 Act for achieving competitive markets are

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[14] Citing Justice Breyer's partial concurrence and partial dissent in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 428-29, the defendant generally asserts that duties requiring sharing of infrastructure may actually reduce competition. But Justice Breyer's point was made in the context of an argument for applying an "essential facilities" standard to the sharing requirements of the Telecommunications Act. Justice Breyer only contended that sharing might reduce competition when the sharing involved a resource that was not an "essential facility." In the case at hand, in contrast, the plaintiff alleges that the local network is an "essential facility."

compatible with the procedures that would be used to accomplish the same result under the antitrust laws." *Goldwasser*, 222 F.3d at 401. *Goldwasser* raises the issue of whether the Telecommunications Act is "specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field." *Id.*

But the Telecommunications Act, while meant to create significant change in a market, is not unprecedented as a legislative attempt to open markets to competition. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Supreme Court held that the antitrust laws apply to at least one other industry regulated by a statute that was intended to encourage competition in the industry. In reviewing a finding of antitrust liability against an electric utility company for its refusal to sell energy at a wholesale price to competing providers, the Supreme Court evaluated the utility's argument that it was not subject to antitrust regulation because of the Federal Power Act. The Court noted that the Act embodied "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Id.* at 374. To achieve this end, section 202 of the Federal Power Act not only encouraged voluntary interconnections of power but also gave the Federal Power Commission the authority to order interconnections. *See id.* at 373. The Telecommunications Act is like the Federal Power Act in that both statutes govern interconnection relationships "in the first instance by business judgment and not regulatory coercion." *Id.* at 374. Sections 251 and 252 of the Telecommunications Act allow ILECs to negotiate voluntarily interconnection agreements with CLECs. Under section 271 of the Telecommunications Act, ILECs can meet one of the requirements of providing long distance service if they negotiate a voluntary interconnection agreement that is approved by a state regulatory agency. See 47 U.S.C. § 271(c)(1)(A). The role of the state agency is not to mandate particular interconnection arrangements but to oversee the process of

voluntary negotiations. While the state regulatory agency is required to approve interconnection agreements, it may only reject an interconnection agreements in certain circumstances. See 47 U.S.C. § 252(e)(2). Although the regulatory process envisioned by the Federal Power Act may not have been as complex and comprehensive as the procedures enumerated in the Telecommunications Act, the statutes have similar purposes and primarily rely on voluntary negotiations. And despite a specific regulatory structure that was meant to encourage competition through interconnection, the Court found that the Federal Power Act did not preclude an antitrust suit against the regulated utility. Thus, controlling case law does not support the theory that specific legislation meant to encourage competition necessarily takes precedence over the general antitrust laws.

Moreover, there is a factual similarity between this case and *Otter Tail Power*. In *Otter Tail Power*, the Supreme Court affirmed a lower federal court that ordered the defendant to "wheel electric power over its transmission lines from other electric power lines to [ ] cities and towns [in its service area]." *Otter Tail Power*, 410 U.S. at 375. Because the Federal Power Commission was not permitted under the Federal Power Act to order such wheeling, the Supreme Court noted that the district court's order did not conflict with the Commission's authority. *See id.* While the Federal Power Commission had the power to "direct a public utility . . . to establish physical connection of its transmission facilities with the facilities [of other sellers of electricity]," *id.* at 375 n.7, it did not have the authority to mandate the particular remedy that the district court had ordered. Similarly, in this case, while state regulatory agencies have the power under the Telecommunications Act to reject interconnection agreements under certain circumstances, they do not have the authority to award the particular remedy that the plaintiff is seeking. The Telecommunications Act does not give state regulatory agencies the power to award consumers

compensation for injury caused by service disrupted by an ILEC that is unlawfully attempting to maintain its local monopoly. Thus, if the district court were to find the defendant liable for violating antitrust law and award the plaintiff damages, such an order would not conflict with the authority of the relevant state regulatory agency.

It is unlikely that allowing antitrust suits would substantially disrupt the regulatory proceedings mandated by the Telecommunications Act. In discussing the impact such suits would have on the regulatory process, it is useful to discuss separately suits seeking damages and suits for injunctive relief. Awarding damages for the willful maintenance of monopoly power would not substantially interfere with the regulatory scheme envisioned by the Telecommunications Act. In contrast, injunctive relief in this area may have ramifications that require particular judicial restraint.

While allowing damages actions would mean that ILECs would to some extent be subject to both the antitrust laws and their interconnection agreements, the defendant points to no specific areas where the two sets of obligations would conflict.[15] The defendant contends that its conduct should only be viewed as a breach of its interconnection agreement with AT & T that should exclusively be remedied by the regulatory process. However, there is no authority for the proposition that entering into an interconnection agreement

[15] Under section 252, an ILEC could theoretically negotiate an interconnection agreement that defined its duties in a way that conflicts with subsections (b) and (c) of section 251. *See* 47 U.S.C. § 252(a)(1). But the defendant has not contended that this particular interconnection agreement conflicts with principles of antitrust law. Moreover, it seems unlikely to us that the LEC entering the market would agree to an interconnection agreement that would in some way reduce competition in the market by restricting the LEC's access to the local loop. If such a conflict were to arise, the state regulatory commission would resolve the dispute, using section 251 as a guideline. *See* 47 U.S.C. § 252(c)(1).

exempts a telecommunications carrier from the antitrust laws.[16] To the contrary, if the defendant's conduct did violate the antitrust laws, the fact that the regulatory commission also condemned the conduct of the defendant may indicate that the purposes of the two schemes are in synch, reinforcing our conclusion that there is no "plain repugnancy" between the statutes. As the plaintiff points out, the breach of such an agreement may in some cases be a means by which the ILEC improperly excludes competition from the market. In this case, the main difference in the two frameworks is that AT & T may seek remedy through the regulatory process while the consumer may seek remedy under the antitrust laws. The two schemes complement rather than contradict each other.

While ideally, the regulatory process alone would be enough to bring competition to the local phone service markets,[17] it is possible that the antitrust laws will be needed to supplement the regulatory scheme, especially with respect to injury caused to consumers.[18] *See Reiter v. Sonotone*

[16] In contrast, there is specific statutory authority that the negotiation of such an agreement fulfills the telecommunication carrier's duties under subsections (b) and (c) of section 251. *See* 47 U.S.C. § 251(c)(1).

[17] The defendant cites *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), an opinion written by Justice Breyer when he was a circuit judge, for the general proposition that regulation inherently reduces the risk of antitrust harm. *Town of Concord*, however, must be read in light of its particular context, a claim alleging a price squeeze in the public utilities industry where regulators had the authority to maintain prices at "reasonable" levels. *Id.* at 25-26. The subject matter of this litigation focuses on the issue of equal access to networks. On this appeal from an order granting a motion to dismiss, we cannot assess the effectiveness of regulation in this industry. In contrast, *Town of Concord* was an appeal after a jury trial where the First Circuit had a complete record to make this determination.

[18] In this case, the relevant regulatory action was directed at AT & T's injuries, not the alleged injuries of AT & T's consumers. Thus, this is not a case like *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 313 n. 19 (1963), where a civil antitrust suit was dismissed because an

Corp., 442 U.S. 330, 344 (1979) ("private [antitrust] suits provide a significant supplement to . . . enforc[ement] [of] the antitrust laws and deterring violations.").[19] Moreover, at this stage, the record does not allow us to conclude that the regulatory process has successfully eliminated the risk of anticompetitive behavior in this particular market. There has been no discovery and the evidence has not been developed with respect to this issue.

Additionally, courts are suited to the task of assessing the extent of damages allegedly caused by unlawful behavior. Damages can be tailored to award one-time relief to retroactively compensate individuals for injuries caused by past misconduct. The award of such damages would not substantially interfere with the broader regulatory process. *See, e.g.*,

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administrative agency may have had the power to award the same remedy being pursued in that suit. The defendant has not argued that the plaintiff could and should seek an administrative remedy in this case. Moreover, there is no evidence that any regulatory body has the authority to compensate the plaintiff for its injuries.

[19] We note that this is an action brought by an injured consumer and not an LEC. Our decision does not address whether LECs seeking to enter the market may ever bring antitrust suits against the ILEC. In this case, we note that the interconnection agreement requires the parties to the agreement to resolve their disputes through arbitration and the administrative process. *See Order Approving Interconnection Agreement*, 1997 WL 410707, at *23, § 16.

We also note that the Telecommunications Act provides telecommunications carriers with incentives to negotiate interconnection agreements and utilize the regulatory process. ILECs who wish to enter the long distance market are required to meet certain requirements. Some of those requirements can be met by successfully negotiating an interconnection agreement. *See* 47 U.S.C. § 271(c)(2)(A)(i)(I). The LEC may have the incentive to proceed through negotiating such an agreement because the regulatory process is likely to provide access to the local network sooner than the court system. Thus, we do not believe that allowing antitrust actions by injured consumers to proceed will necessarily cause telecommunications carriers to avoid the regulatory process.

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 222 (1966) (noting that award of treble antitrust damages would not interfere with future action by regulatory agency).

On the other hand, the possibility of injunctive relief in this case may be more problematic than an award of damages. Courts may not be suited to order particular actions by telecommunications carriers to make the local markets more competitive, particularly when there is a specific regulatory scheme meant to serve the same purpose. An overly broad injunction might interfere with the regulatory framework. But this is not a reason to dismiss the suit at this stage, especially because the plaintiff may no longer be asserting claims for injunctive relief. The possibility of an injunction that conflicts with the regulatory framework will not be an issue until the end of the litigation if there is a finding of liability. It is possible that court intervention could be appropriate in some limited circumstances. However, courts must be both mindful and wary of the strong possibility that injunctive relief could have the unintended consequence of disrupting the regulatory scheme. We have confidence that courts will exercise their discretion with restraint in any case where such relief is appropriate, consistent with respect for the overarching regulatory regime that Congress has created.

Therefore, we reverse the district court's dismissal of the plaintiff's antitrust claim.

CONCLUSION

For the reasons stated above, we affirm the district court's dismissal of the plaintiff's section 251 claim. The judgment of the district court is vacated with respect to its dismissal of the plaintiff's other claims, and the case is remanded for further proceedings consistent with this opinion.

SACK, *Circuit Judge*, concurring in part and dissenting in part.

I concur with the majority's resolution of the plaintiff's appeal with respect to its claims under § 2 of the Sherman Act and § 202 of the Communications Act. I write briefly and separately to make an observation as to these. I respectfully dissent, however, with regard to the majority's disposition of the appeal of the dismissal of the plaintiff's claim under § 251 of the Telecommunications Act, which I would remand to the district court for further consideration.

I. The Sherman Act Claim

I concur with the majority's disposition of the appeal with respect to the antitrust claim. I write separately to emphasize the extent to which, in my view, the procedural posture of the case may influence the outcome of this appeal.

The plaintiff alleges in its amended complaint that:

> Throughout the [relevant p]eriod, [the defendant] has not afforded [competing local exchange carriers ("CLECs")] access to the local loop on a par with its own access. Among other things, [the defendant] [1] has filled orders of CLEC customers after filling those for its own local phone service, [2] has failed to fill in a timely manner, or not [sic] at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and [3] has systematically failed to inform CLECs of the status of their customers' orders with [the defendant].

Am. Compl. at ¶ 21. The plaintiff further alleges:

> On March 9, 2000, after Plaintiff retained counsel to investigate and pursue its claim, [the defendant] agreed to pay a $3 million fine to the U.S. Treasury pursuant to a consent decree entered into between [the defendant]

> and the Federal Communications Commission arising out of [the defendant's] failure to provide adequate access to Local Phone Service competitors in New York to the level required when the Federal Communications Commission allowed [the defendant] to offer long-distance telephone service to New Yorkers and to pay $10 million in compensation to competing Local Phone Service providers in New York for injury caused to them as a result of [the defendant's] misconduct in handling orders from such competing Local Phone Service providers.

Am. Compl. at ¶ 22. Elsewhere in its amended complaint, the plaintiff asserts that the defendant's conduct injured it. Am. Compl. ¶ 23.

Additionally, in its original complaint, in connection with its allegations concerning Section 251 of the Telecommunications Act, the plaintiff made allegations, parallel to those contained in ¶¶ 21 and 22 of the amended complaint, Compl. ¶¶ 31, 32, consisting of quotations of "obligations" imposed on incumbent local exchange carriers ("ILECs") under the Act, and assertions that the defendant did not fulfil these "obligations."

The defendant responds, however, that this litigation is about only a single sequence of events referred to in the third clause of paragraph 21 and in paragraph 22 of the amended complaint and similar allegations in the original complaint. As the defendant describes these events:

> In the weeks that followed the approval of the New York long-distance application, [the defendant] encountered a problem with the computer systems it adopted (the "operation support systems" or "OSS") to satisfy the regulators' demands during the long-distance-approval process. The problem affected the ability of competitors who had placed orders with [the defendant] to receive an

> electric confirmation notification that their orders were being processed. AT&T and others immediately filed complaints with the FCC and with the New York PSC. On March 9, 2000, the defendant entered a consent decree with the FCC resolving the matter by ensuring prompt cure of the problem and payment of $3 million to the United States and $10 million to AT & T and other competitors for their losses.... Just a few months later, in July 2000, with the problem fixed, the FCC dissolved the consent decree.

Appellee's Br. at 9; *see also In the Matter of Bell Atlantic*, 15 F.C.C.R. 5413, 2000 WL 571154 (2000) (consent decree).

The defendant thus insists that this case concerns a computer malfunction that led to a failure to confirm orders by AT & T to the defendant, and no more. The defendant further underscores the fact that it has already paid ten million dollars to CLECs, including AT & T, to compensate them for the injury that they suffered as a result, and $3 million to the FCC as a sanction for any misconduct for which the defendant is responsible. If indeed the plaintiff's claim rests only on the order confirmation failure, and the evidence shows that service lapses were temporary and a consequence of technical flaws alone, it may be that summary judgment will ultimately be available to the defendant on the Sherman Act claim. Evidence of service lapses, absent other indicia of predatory conduct, may not be enough to establish an attempt to injure competition or gain a competitive advantage.

But the district court dismissed the complaint under Fed.R. Civ.P. 12(b)(6) for "failure to state a claim upon which relief can be granted," and it is premature to conclude that the plaintiff cannot establish that the failure to provide prompt order confirmations was not a technical problem, but rather an attempt to fend off competition in the local service market from AT & T or other CLECs. It is also too early to be sure that the plaintiff cannot establish that, independent of

confirmation delays, the defendant delayed filling orders of CLECs' customers, but not those of its own customers, or failed to fill orders for CLECs' customers at all, thus injuring competition or gaining a competitive advantage, as the plaintiff also alleges. Should the plaintiff be able to establish the existence of such circumstances, I see no bar to its Sherman Act claim.

Upon a Rule 12(b)(6) motion, dismissal is not warranted unless "no relief could be granted under *any* set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (emphasis added); *accord In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001). Relief can be awarded in this case under a set of facts consistent with the allegations in the complaint, even if the existence of those facts may seem somewhat doubtful.

II. Section 251 of the Telecommunications Act

I find the majority's approach to the plaintiff's § 251 claim, majority opinion, ante at [16a-25a], generally well thought out and well articulated, and agree that the district court's resolution of the issue was erroneous. But the ground on which the majority affirms the judgment of the district court is different from that relied upon by the district court and those discussed by the parties on appeal. As far as I can determine, moreover, no other circuit has considered this precise question. Especially in light of the fact that the plaintiff's other claims are being returned to the district court, I would return the § 251 claim for further exposition by the parties and consideration by that court.

The § 251 claim is set forth only in the plaintiff's original complaint. As noted previously, part of the plaintiff's pleading in this regard is a verbatim recitation of the defendant's "[o]bligations [as a] local exchange carrier[ ]" under § 251(b), and its "[a]dditional obligations [as an] incumbent local exchange carrier[ ]" under § 251(c). Compl. at ¶¶ 45-49.

I think that insofar as the district court dismissed these allegations, that dismissal must be affirmed. "[S]weeping legal conclusions cast in the form of factual allegations" do not suffice to state a claim even at the Rule 12(b)(6) stage. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990). "While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996).

The remainder of the plaintiff's § 251 claim is based on allegations in the original complaint parallel to those in §§ 21 and 22 of the amended complaint set forth above.

> [The defendant] [1] has fulfilled orders of other Local Phone Service providers' customers after fulfilling those for its own Local Phone Service providers' customers, [2] has failed to fill a substantial number of orders for other Local Phone Service providers' customers substantially identical in circumstances to its own Local Phone Service customers for whom it has filled orders, and [3] has systematically failed to inform other Local Phone Service providers of the status of their orders with [the defendant] concerning their (the other Local Phone Service providers') customers.

Compl. at ¶ 31.

CLECs' customers' "orders" are doubtless "telecommunications services" within the meaning of the Telecommunications Act. *See* 47 U.S.C. § 153(46) (defining "telecommunications services" to include "the offering of telecommunications for a fee directly to the public"). Delayed and unfulfilled orders of CLECs' customers—if both their existence and their unreasonable discriminatory nature can be established by the plaintiff in the district court—implicate the defendant's duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of

its telecommunications services" under § 251(b)(1) and § 251(c)(4)(B). The allegations in the complaint *also* include facts that would constitute violations of the interconnection agreement between AT & T and the defendant: The agreement states that the defendant "will make available to AT & T . . . the Telecommunications Services (As Defined in the Act) that it provides at retail to its non-carrier subscribers." *Order Approving Interconnection Agreement*, 1997 WL 410707, at *41 (N.Y. Pub. Serv. Comm'n June 13, 1997). Among the services the defendant must provide are "residence orders" and "business orders." *Id.* Any violation of the interconnection agreement thus also arises out of provisions of the agreement that implement § 251.

The majority notes that "section 251 envisions that [the enumerated] duties will be implemented through contracts between . . . carrier[s]." Majority opinion, ante at [21a-22a]. It then observes that interconnection agreements "may [be] *negotiate[d]* . . . without regard to the standards set forth in subsections (b) and (c) of section 251." Majority opinion, ante at 321 (quoting 47 U.S.C. § 252(a)(1)) (emphasis in original omitted; emphasis added). From this provision, the majority infers that "Congress envisioned the possibility that the negotiated parts of the interconnection agreement could result in a different set of duties than those defined by the statute," rendering § 251 "superfluous." Majority opinion, ante at [23a]. Hence, the majority concludes, no § 207 right of action obtains for violations of § 251.

I hesitate to accept the conclusion that the presence of a partially negotiated interconnection agreement here renders the duties of the defendant enumerated in § 251 "superfluous." Section 252(a)(1), upon which the majority relies, refers only to portions of agreements that are "negotiate [d]." *Id.* But "[a]greements can be formed in two different ways: voluntary negotiation or compulsory arbitration." *Bellsouth Telecommunications Inc. v. MCImetro Access Transmission*

Servs., Inc., 278 F.3d 1223, 1228 (11th Cir. 2002). An agreement may further contain a mix of negotiated portions and arbitrated portions. *See* 47 U.S.C. § 252(e)(2)(A) (referring to "portion[s]" of an agreement that are negotiated). Section 252(a)(1) does not cover provisions reached by compulsory arbitration under § 252(b). The interconnection agreement between AT & T and the defendant here was, at least in part, "arrived at through compulsory arbitration." *Order Approving Interconnection Agreement*, 1997 WL 410707, at *1.

Sections of interconnection agreements reached through arbitration, unlike negotiated sections, must contain limitations on the behavior of an ILEC congruent with those contained in § 251. *See Verizon Communications, Inc. v. FCC*, ___ U.S. ___, 122 S.Ct. 1646 (2002); *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 372-73 (1999); *U.S. West Communications, Inc. v. Sprint Communications Co.*, 275 F.3d 1241, 1244-45 (10th Cir. 2002); *MCI Telecommunication Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 500-01 (3d Cir. 2001). All interconnection agreements, whether reached by negotiation or arbitration, must be approved by state commissions, 47 U.S.C. § 252(e)(1); *Bellsouth Telecommunications*, 278 F.3d at 1228, but the basis on which they may be rejected differs. A negotiated section of an agreement may be rejected only if it "discriminates against a . . . carrier not a party to the agreement" or if it "is not consistent with the public interest." 47 U.S.C. § 252(e)(2)(A). An arbitrated section of an agreement, by contrast, may be rejected only on the ground that it "does not meet the requirements of section 251." *Id.* § 252(e)(2)(B).

In the instant case, the New York Public Service Commission (the "Commission"), to determine whether it should reject or endorse the agreement, inquired whether "the *entire* Agreement" met, *inter alia*, "the requirements of § 251." *Order Approving Interconnection Agreement*, 1997 WL

410707, at * 1 (emphasis added). The Commission determined that "[p]ursuant to the standard enunciated in § 252(e)(2)(B)"—*i.e.*, the § 251 duties—the interconnection agreement did "not violate the requirements of the Act." *Id.* at *3. The entire interconnection agreement here is thus tied closely to the specific requirements of § 251, even though portions of negotiated agreements may not be in all cases.

Section 207 provides a right of action based on "any act" that a carrier is "required" to do. 47 U.S.C. §§ 206 & 207. The majority identifies no explicit abrogation of this unequivocal language in the context of duties under § 251. As a practical matter, carriers execute such duties when fulfilling arbitrated portions of interconnection agreements because the latter identify specific means of meeting the general duties enunciated in § 251. Indeed, even the fulfillment of an entirely negotiated agreement *might* also perhaps be construed as being an "act . . . required to be done" by the Act.[1] I am therefore reluctant either to endorse the majority's logic, or to conclude that all interconnection agreements, or only arbitrated portions thereof, should give rise to § 207 rights of action. Absent briefing on practical matters, such as the actual frequency of conflicting duties under § 251 and interconnection agreements, and the difficulty of distinguishing negotiated from arbitrated portions of agreements, I am hesitant to guess at how in practice interconnection

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[1] It is not clear that § 251 duties are entirely displaced even by negotiated agreements in all instances. At least one circuit court has concluded that even agreements "negotiated and agreed upon 'with regard' to the 1996 Act and law thereunder," although not arbitrated, may be judicially altered to conform with § 251 and regulations issued thereunder. *AT & T Communications of the S. States, Inc. v. Bellsouth Telecommunications, Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). Not even negotiation, then, necessarily removes an interconnection agreement from § 251's force.

agreements interact with the duties specified in § 251, and to avoid a statutory command based on what seem to me to be suppositions.

Although the record does not allow us to determine whether portions of the agreement allegedly violated here were arbitrated or negotiated, we know that the *entire* agreement fulfilled § 251. The obligations of the defendant contained in the interconnection agreement that the plaintiff alleges have been breached may therefore exist solely because the agreement must conform to the provisions of § 251. Perhaps then the defendant's alleged failure to fulfil the obligations were, under § 206 of the Act, "act[s], matter[s], or thing [s] [in the Telecommunications Act] required to be done [by the Act]" that would, contrary to the majority's conclusion, support a right of action under § 207 of the Act.

I would therefore remand for consideration of this issue in the first instance by the district court. An opinion by the learned district judge, a well-developed factual record, and proper briefing cannot but aid in our resolution of this complex and difficult issue. I therefore respectfully dissent from the majority's disposition of it.

III. Section 202

Finally, subject to observations similar to those contained in Section I of this concurrence about the antitrust claims, I concur with the majority's conclusion as to the plaintiff's claims under § 202 of the Communications Act.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

[Filed Dec. 6, 2000]

No. 00 Civ. 1910(SHS)

LAW OFFICES OF CURTIS v. TRINKO, LLP,
Individually and on Behalf of Themselves
and All Others Similarly Situated,
Plaintiff,

v.-

BELL ATLANTIC CORP.,
Defendant.

OPINION AND ORDER

STEIN, *District Judge*.

Defendant Bell Atlantic Corp. has moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that plaintiff lacks standing and that the complaint fails to state a claim. For the reasons set forth below, that motion is granted, with leave to replead in part.

I. BACKGROUND

Pursuant to the Telecommunications Act of 1996, local telephone companies may enter the market for long-distance telephone service provided they face competition in the local telephone service market. 47 U.S.C. § 271(c). To promote development of competition in local telephone service markets, the Act requires that incumbent local telephone companies provide certain services to new entrants, including permitting access to the incumbent local telephone

company's network by the new entrant—called "interconnection"—and providing retail services to new entrants at wholesale rates. 47 U.S.C. § 251(c).

According to the complaint, Bell Atlantic, an incumbent local telephone company, applied for and received regulatory approval to offer long-distance telephone service in certain parts of the Northeast. Compl. ¶ 11. Bell Atlantic has allegedly not, however, assisted its local phone service competitors as required by the Telecommunications Act. *Id.* ¶ 12. Instead, Bell Atlantic is alleged to have:

> fulfilled orders of other Local Phone Service providers' customers [only] after fulfilling those for its own Local Phone Service, has failed to fill a substantial number of orders for other Local Phone Service providers' customers substantially identical in circumstances to its own Local Phone Service customers for whom it has filled orders, and has systematically failed to inform other Local Phone Service providers of the status of their orders with Bell Atlantic concerning [the Local Phone Service providers'] customers.

Id. ¶ 31.

On March 9, 2000, the Federal Communications Commission ("FCC") issued a consent decree in which Bell Atlantic agreed to pay a $3 million fine to end an investigation into its alleged failure to provide adequate access to local phone service competitors in New York. *Id.* ¶ 32; *Bell Atlantic—New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rec. 5413, 2000 WL 571154 (2000). Bell Atlantic also agreed to pay $10 million to competing local telephone service providers for injuries resulting from its misconduct in handling their orders. Compl. ¶ 32.

The next day, the Law Offices of Curtis V. Trinko, LLP, a law firm organized as a limited liability partnership under New York law and a customer of one of Bell Atlantic's competitors in the local telephone service market, filed this action on behalf of itself and all others similarly situated. The Trinko partnership alleges that the members of the class have been damaged by Bell Atlantic's provision of "a level of service that is materially below the level that is accorded customers of Bell Atlantic's Local Phone Service in functionally identical circumstances." *Id.* ¶ 12. The complaint asserts a claim for unlawful monopolization in violation of section 2 of the Sherman Act, claims for violations of section 251 and 202 of the Communications Act, and a claim for tortious interference with contract. The complaint alleges that the relevant market is the provision of local, non-wireless telephone service in those areas in which Bell Atlantic is the "incumbent local exchange carrier" within the meaning of the 1996 Telecommunications Act, and that Bell Atlantic possesses monopoly power in that market. *Id.* ¶¶ 18-25.

Bell Atlantic now moves for dismissal of the complaint in its entirety on the grounds that the Trinko partnership lacks standing to bring the Sherman Act claim and the Communications Act claims, that plaintiff's Communications Act claims are not cognizable, that plaintiff has failed to state a claim for tortious interference with contract, that plaintiff has not sufficiently pled damages, and that all of plaintiff's claims for damages are barred by the filed tariff doctrine.

II. DISCUSSION

When deciding a motion to dismiss a claim pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept all of the well-pleaded facts as true and draw all reasonable inferences from those allegations in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The complaint will survive a motion to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A. *The Sherman Act Claim*

Bell Atlantic contends that because its alleged anti-competitive conduct is violating its duties to competing carriers under the Telecommunications Act, any injury suffered by the alleged class, as customers of those carriers, "is, by definition, indirect and derivative of the competing carriers' alleged direct market injury." Def.'s Mem. at 12. Thus, according to defendant, the Trinko partnership lacks standing to pursue its Sherman Act claim. Bell Atlantic also argues that to hold otherwise would subject it to the risk of duplicative recovery, *i.e.*, Bell Atlantic might have to compensate both the new entrants into the local telephone service market and their customers for the same harm, assuming liability exists in the first place.

Courts have consistently held that both competitors and consumers may assert antitrust claims arising from harms that flow from anticompetitive conduct. *E.g., SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995) ("[T]he presumptively 'proper' [antitrust] plaintiff is a customer who obtains services in the threatened market or a competitor who seeks to serve that market."); *Continental Orthopedic Appliances, Inc. v. Health Insurance Plan of Greater New York*, 956 F.Supp. 367, 372 (E.D.N.Y. 1997) ("To have standing, a plaintiff must be a competitor, participant, supplier or consumer in the relevant market."). Indeed, in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), upon which Bell Atlantic itself relies, the United States Supreme Court found that the plaintiff lacked standing because it "was neither a consumer nor a competitor in the market in which trade was restrained." 459 U.S. at 539. Plaintiff, as a consumer in the alleged relevant market, has standing to assert an antitrust claim.

Bell Atlantic cites the United States Supreme Court decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), for the proposition that permitting the Trinko partnership to maintain this action would impermissibly subject Bell Atlantic to the risk of duplicative recovery. However, the issue in *Illinois Brick* was whether "indirect purchasers," *i.e.*, customers of the monopolists' customers, could maintain an action on the theory that all of the harm—supracompetitive prices—had been passed on to them. *Illinois Brick*, 431 U.S. at 726-28. The Supreme Court held that suits by such "indirect purchasers" were barred by the rule announced in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), prohibiting antitrust defendants from introducing evidence that the antitrust plaintiff had passed on an illegal overcharge to others. *Illinois Brick*, 431 U.S. at 745-47. The Court explained that permitting suits by indirect purchasers "inject[ed] extremely complex issues into the case" as follows:

> Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.

Id. at 745.

These problems of apportionment are not present here. Any harm to Bell Atlantic's competitors would be harms from artificial barriers to entry into the market place, *e.g.*, lost profits from customers either lost or never obtained because of Bell Atlantic's alleged misconduct. The plaintiff and other class members, though, were, by definition, not lost customers, but customers from whom the competitors presumably profited in spite of Bell Atlantic's misdeeds. The harm

that these customers are alleging—damages resulting from poorer service than they would otherwise have received had Bell Atlantic acted lawfully—is wholly distinct from the harm suffered by the competitors. The rule of *Illinois Brick* does not apply to this case.

Even though plaintiff has standing, however, its antitrust claim must nevertheless be dismissed because the Trinko partnership has not pled facts that would entitle it to relief. *See Conley*, 355 U.S. at 45-46. The elements of a monopolization claim under section 2 of the Sherman Act are: (1) possession of monopoly power in the relevant market; and (2) willful acquisition or maintenance of that power, as distinguished from "business growth or development as a consequence of superior product, business acumen or historic accident." *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 97 (2d Cir. 1998) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). The complaint fails to establish the second element.

The complaint points to only one act or series of acts taken by Bell Atlantic to maintain its monopoly power. Bell Atlantic's failure to cooperate with local competitors as required by 47 U.S.C. § 251. Even a monopolist, however, has no general duty under the antitrust laws to cooperate with competitors. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985); *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988). Indeed, because all competition necessarily involves impairing the opportunities of rivals, liability under the antitrust laws arises only when such impairment "does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605 n. 32; *see also United States Football League*, 842 F.2d at 1359.

The affirmative duties imposed by the Telecommunications Act are not coterminous with the duty of a monopolist to refrain from exclusionary practices. *Goldwasser v. Ameritech*

Corp., 222 F.3d 390, 400 (7th Cir. 2000). Moreover, the mere fact that a monopolist has violated another statute does not transform such offense into a violation of the antitrust laws. *Id.* Thus, plaintiff has failed to allege any "willful acquisition or maintenance" of monopoly power by Bell Atlantic. *See Tops Markets*, 142 F.3d at 97. Plaintiff's antitrust claim is dismissed.

B. *Communications Act Claims*

The Communications Act provides, in relevant part, that:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206. The Act also provides that "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter ... may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction." 47 U.S.C. § 207.

The Trinko partnership has brought two claims pursuant to those sections. First, it claims that it and the other class members have been damaged by Bell Atlantic's failure to meet the obligations imposed on it by 47 U.S.C. § 251 to cooperate with competing local carriers, as discussed above. Second, the Trinko partnership claims that it and the other

class members have been damaged by Bell Atlantic's unlawful discrimination in services between its customers and customers of its local competitors in violation section 202(a) of the Act, which provides that:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in . . . services . . . , directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a).

1. *Cognizability*

Bell Atlantic contends that these claims are not cognizable. It notes that sections 206 and 207 were part of the original 1934 Communications Act, and argues that violations of provisions of the 1996 Telecommunications Act, such as section 251, cannot form the basis of a section 207 claim because those claims would interfere with the overarching regulatory scheme of the 1996 Act. Thus, says Bell Atlantic, no court has ever recognized an action pursuant to section 207 based on a violation a provision of the 1996 Act. Bell Atlantic further argues that because the Trinko partnership's claim based on an alleged violation of section 20—a provision of the 1934 Act--is based on the same conduct that forms part of its claim based on violation of section 251, it, too, must not be cognizable lest plaintiffs "circumvent" the regulatory process prescribed by the 1996 Act.

However, violations of the 1996 Act can form the basis for liability pursuant to sections 206 and 207. As the Supreme Court has noted, "the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, [the 1934 Act]." *AT & T Corp. v. Iowa Utilities Bd.*,

525 U.S. 366, 378 n.5 (1999). Accordingly, when Judge Ward of this district considered a suit pursuant to sections 206 and 207 based on a violation of another provision of the 1996 Act, he recognized that "plaintiffs do have a private right of action under Sections 206 and 207 of the Telecommunications Act for damages suffered as a result of a violation of the [1996] Act." *Conboy v. AT & T Corp.*, 84 F.Supp.2d 492, 500 (S.D.N.Y. 2000).

Moreover, contrary to Bell Atlantic's position, suits by consumer plaintiffs are not *per se* incompatible with the regulatory scheme of the 1996 Act. Any incompatibility must be evaluated on a case-by-case basis and will depend on the specific provision alleged to have been violated as well as the identity of the party asserting the claim.

In this case, the specific provision of section 251 that Bell Atlantic is alleged to have violated is 47 U.S.C. § 251(c)(2)(C), which details an incumbent carrier's duty to provide "interconnection . . . that is at least equal in quality to that provided by the local exchange carrier to itself . . . or any other party to which it provides interconnection." The parties asserting the claim are customers of interconnected carriers. Such a claim does not directly implicate the regulatory scheme Congress created to govern the formation of interconnection agreements. *See* 47 U.S.C. § 252. Thus, the cases relied on by Bell Atlantic involving potential competitors attempting to circumvent the provisions of 47 U.S.C. § 252 are inapposite. *See Atlantic Alliance Telecommunications, Inc. v. Bell Atlantic*, No. 99 CIV. 4915, slip op., (E.D.N.Y. April 17, 2000), *Indiana Bell Tel. Co. v. McCarty*, 30 F.Supp.2d 1100, 1104 (S.D.Ind. 1998).

To the extent that this or a similar claim might indirectly implicate the regulatory scheme, the filed tariff doctrine and the doctrine of primary jurisdiction are available to insure that judicial action is consistent with the regulatory process. *See, e.g., Oh v. AT & T Corp.*, 76 F.Supp.2d 551, 554-58

(D.N.J. 1999). Application of these doctrines on a case-by-case basis is superior to a *per se* rule that would have courts disregard the explicit provision of a private right of action in 47 U.S.C. § 207. *Contra Goldwasser v. Ameritech Corp.*, No. 97 C 6788, 1998 WL 60878, at *10 (N.D.Ill. Feb. 4, 1998) ("[B]ecause of the potential for frustrating the goals of the 1996 Act, Plaintiffs should not be permitted standing" to assert a section 207 claim based on a violation of section 251.), *aff'd on other grounds*, 222 F.3d 390 (7th Cir. 2000). Similarly, *AT & T Communications of Cal., Inc. v. Pacific Bell*, 60 F.Supp.2d 997 (N.D.Cal. 1999), on which Bell Atlantic relies, does not provide it with adequate succor. The holding in that case is that an implied right of action does not exist pursuant to section 206. 60 F.Supp.2d at 1000. In this case, plaintiff is proceeding pursuant to the explicit private right of action created by section 207, not an implied private right of action.

Plaintiff's other section 207 claim is based on a violation of section 202(a). Defendant does not point to a regulatory regime specific to section 202(a), but contends instead that because the section 202(a) claim "is based on the very same conduct as Plaintiff's section 251 claim," the section 202(a) claim would impermissibly interfere with the regulatory process in the same manner as the section 251 claim. Def.'s Mem. at 8. Because the Court rejects Bell Atlantic's argument as to the section 251 claim, its argument as to the section 202(a) claim is rejected as well.

2. *Standing*

Bell Atlantic next argues that the Trinko partnership lacks standing to bring the Communications Act claims because the rights created by sections 251 and 202 do not belong to plaintiff, but instead belong to the competing local carriers. Thus, Bell Atlantic maintains, any injury suffered by plaintiff

and other class members is indirect and derivative of the injury suffered by the competing local carriers through defendant's alleged violation of those rights.

"The doctrine of standing incorporates both constitutional and prudential limitations on federal court jurisdiction." *Wight v. Bankamerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000) (quoting *Lamont v. Woods*, 948 F.2d 825, 829 (2d Cir. 1991)); *Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994). The constitutional dimension, which derives from the "case or controversy" requirement of Article III, *see Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1106 (2d Cir. 1992), "requires the party invoking the power of a federal court to have at least a 'personal stake in the outcome of the controversy.'" *Wight*, 219 F.3d at 86 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *see also Allen v. Wright*, 468 U.S. 737, 751 (1984).

There are also several judicially created "prudential" requirements. *Lamont*, 948 F.2d at 829. These rules of judicial self-restraint are applied to further preserve a "'proper—and properly limited—role of the courts in a democratic society.'" *Allen*, 468 U.S. at 750 (quoting *Warth*, 422 U.S. at 498); *see also Sullivan*, 962 F.2d at 1106. "Foremost among the prudential requirements is the rule that a party must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Wight*, 219 F.3d at 86 (quoting *Warth*, 422 U.S. at 499). Properly understood, the "prudential" limit on standing to raise the claims of another is a canon of statutory interpretation that raises a presumption against such standing, which presumption Congress is free to override. *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1278 (D.C.Cir. 1994).

Applying these principles to this case, plaintiff has satisfied the constitutional standing requirements. As discussed above, the Trinko partnership has alleged injuries to itself and other

class members, which injuries give it the "personal stake in the outcome of the controversy" that Article III demands. *See Warth*, 422 U.S. at 498.

The prudential standing requirements are another matter. Section 251 imposes duties on incumbent carriers only as to local competitors, and those rights are triggered only when a competing carrier requests interconnection. 47 U.S.C. §§ 251, 252. Thus, the Trinko partnership's section 251 claim is not a claim for damages resulting from a violation of its rights, but rather a claim for damages resulting from a violation of a third party's rights, *i.e.*, the rights of the Trinko partnership's local telephone company. Because the rule that a party cannot rest his claim to relief on the legal rights or interests of third parties is the "foremost" tenet of prudential standing, *Wight*, 219 F.3d at 86, the Trinko partnership's section 207 claim based on a violation of section 251 must be dismissed.

The duties imposed on carriers by section 202(a), on the other hand, do not apply only to "competitors", but instead apply more broadly to "any particular person, class of persons, or locality" to which that carrier provides service. 47 U.S.C. § 202(a). Thus, if plaintiff and other class members receive service from Bell Atlantic, it owes them duties of non-discrimination pursuant to section 202(a) even if Bell Atlantic is acting on behalf of its competitors pursuant to an interconnection agreement. If defendant has breached such duties, the Trinko partnership's damages flowing from that breach arise from a violation of its rights, and not the rights of any third party.

The complaint, however, contains no allegation that the Trinko partnership or any other class member receives any service directly from Bell Atlantic. Instead, the Trinko partnership alleges that Bell Atlantic has failed to provide non-discriminatory service to its competitors. *E.g.*, Compl. ¶ 31. Accordingly, plaintiff's section 207 claim based on

violations of section 202(a) is dismissed with leave to replead the direct provision of services by Bell Atlantic to the Trinko partnership and other class members on discriminatory terms.

3. *Other Arguments*

Having dismissed plaintiff's Communications Act claims for lack of standing, the Court need not address Bell Atlantic's arguments that the Trinko partnership has failed to sufficiently plead damages and that its claims are barred by the filed tariff doctrine.

C. *Tortious Interference Claim*

As this Court has dismissed all of plaintiff's federal claims, there remains no independent basis for federal jurisdiction over the remaining state law claim for tortious interference. That claim, therefore, is dismissed. *See* 18 U.S.C. § 1367(c)(3); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); *Baylis v. Marriott Corp.*, 843 F.2d 658, 665 (2d Cir. 1988). Accordingly, the Court need not address Bell Atlantic's arguments that the Trinko partnership has failed to state a claim for tortious interference and that the claim is also barred by the filed tariff doctrine.

III. CONCLUSION

For the reasons set forth above, the motion to dismiss the complaint is granted. Plaintiff may replead its Communications Act claim based on defendant's alleged violation of 47 U.S.C. § 202(a) as well as its supplemental claim for tortious interference with contract within 20 days of this Opinion and Order.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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00 Civ.1910

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Individually and on Behalf of Themselves and
All Others Similarly Situated,
Plaintiff,

-against-

BELL ATLANTIC CORP.,
Defendant.

ORDER

SIDNEY H. STEIN, U.S. District Judge.

Plaintiff Law Offices of Curtis V. Trinko, LLP, brought this putative class action for alleged violations of the Sherman Act, the Communications Act, and state law arising from defendant Bell Atlantic Corp.'s allegedly discriminatory treatment of both competitors in the market for local telephone service and the competitors' customers. After this Court dismissed plaintiff's complaint with leave to replead a claim pursuant to section 202 of the Telecommunications Act and a claim for tortious interference with contract, *see Law Offices of Curtis v. Trinko, LLP v. Bell Atlantic Corp.,123* F. Supp. 2d 736 (S.D.N.Y. 2000) ("*Trinko I*"), and subsequently granted plaintiff's request to replead a claim pursuant to the Sherman Act, *see* Order of January 5, 2001, plaintiff filed an Amended Complaint dated January 19, 2001. Familiarity with *Trinko I* and the January 5, 2001, Order are presumed. Bell Atlantic now moves pursuant to Fed.R.Civ.P.12(b)(6) to

dismiss the Amended Complaint for failure to state a claim. For the reasons set forth below, Bell Atlantic's motion is granted.

I. BACKGROUND AND FACTS

The Amended Complaint alleges essentially the same relevant facts as were set forth in *Trinko I*. The Trinko partnership has also made the following additional allegations and clarifications in an effort to address the inadequacies of tis earlier complaint:

The Amended Complaint now alleges explicitly that "[p]laintiff and the other members of the Class use Bell Atlantic's local loop when they obtain local phone service from the CLECs [i.e., competing local exchange carriers]." Am Compl. ¶ 25. In addition, it now describes the relationship between the CLECs, their customers, and Bell Atlantic as follows:

> Plaintiff's local phone service requires access to and the provision by Bell Atlantic of services on Bell Atlantic's local loop, as does the local phone service of Plaintiff's fellow class members. Such access and the provision of such services is arranged by its CLEC, which has entered into an agreement with Bell Atlantic pursuant to which Bell Atlantic is obligated to afford the CLEC access to and services on the local loop on the same terms as are afforded to its (Bell Atlantic's) own local phone service customers. In each such case, the CLEC acts as the agent for its customers . . . in arranging with Bell Atlantic for suc access or the provision of such services.

Id. ¶24.

With respect to the allegations of anticompetitive conduct in violation of the Sherman Act, the Amended Complaint now alleges that Bell Atlantic "induced CLECs to attempt to enter into the Local Phone Service market" by entering into resale agreements, then breached those agreements with the purpose of acquiring or maintaining monopoly power in the local phone service market. *Id.* ¶¶ 54-58.

II. DISCUSSION

When deciding a motion to dismiss a claim pursuant to Fed. R. Civ. P. 2(b)(6), a court must accept all of the well-pleaded facts as true and draw all reasonable inferences from those allegations in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The complaint will survive a motion to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)

A. *The Communications Act Claim*

In *Trinko I*, this Court held that section 202(a) of the Communications Act imposes duties of non-discrimination on common carriers, such as Bell Atlantic, with respect to "any particular person, class of persons, or locality' to which that carrier provides service." 123 F. Supp. 2d at 744. Because the original complaint pled the discriminatory provision of services to CLECs, rather than to the Trinko partnership and other class members, the Court held that the Trinko partnership lacked standing to assert the claims as pled. *Id.* at 744-45. However, the Court granted the Trinko partnership leave to replead "the direct provision of services by Bell Atlantic to the Trinko partnership and other class members on discriminatory terms." *Id.* at 745.

The partnership has now explicitly pled that it uses Bell Atlantic's local loop when obtaining local phone service from its CLEC. In other words, Bell Atlantic provides access to a CLEC to the Trinko partnership via a local loop. As the Trinko partnership concedes, however, "the Amended Complaint challenges not the provision of 'access' but the provision of specific services . . . ." Pl.'s Mem. at 4. Thus, the discrimination complained of by the Trinko partnership is not the discriminatory provision of local loops, but rather the allegedly discriminatory provision of services necessary to the

CLECs' provision of telephone service to their customers. *See* Am. Compl. ¶ 21.

The Trinko partnership acknowledges in the complaint that the services at issue are provided by Bell Atlantic to CLECs—rather than to the CLECs' customers—pursuant to agreements by which "Bell Atlantic is obligated to afford the CLEC access to and services on the local loop." Am. Compl. ¶ 24. It contends, however, that the CLECs are merely acting as "agents" for their customers in arranging for Bell Atlantic to provide those services to the CLECs' customers. *Id.* But the Trinko partnership has failed to plead any facts supporting the bare allegation of a principal-agent relationship. There is no allegation that the CLECs' customers were billed by Bell Atlantic for the services in question, nor is there any indication that in obtaining the services, the CLECs consented to act subject to their customers' direction and control, and the customers consented to exercising control over the CLECs. Cf. *Global Entm't, Inc. v. New York Tel. Co.*, No. 00 Civ. 2959, 2000 WL 1672327, at *6 (S.D.N.Y. Nov. 6, 2000). Accordingly, the discrimination alleged in the complaint was directed at the CLECs, and not the CLECs' customers.

The Trinko partnership next contends that even if the discrimination were directed at the CLECs, it and the other class members have suffered "indirect" discrimination that is cognizable pursuant to provisions of 47 U.S.C. § 202(a) prohibiting "discrimination in charges . . . or services . . . directly or indirectly" or "subject[ing] any particular person [or] class of persons . . . to any undue or unreasonable prejudice or disadvantage." Despite section 202(a)'s broad language, however, courts have applied the statute only where a common carrier has offered the same services at different prices to different customers, or has offered some customers less service at the same price it has offered other customers better service. *See, e.g., Nat'l Comm., Ass'n v. AT&T Corp.*, 238 F.3d 124,

125-26 (2d Cir. 2001); *Competitive Telecomm. Ass'n v. FCC*, 998 F.2d 1058,1064 (D.C. Cir. 1993) ("Section 202(a) is designed to prevent a carrier from granting a discount to one (usually large) user that it would not grant were the same or a "like" service purchased by another (usually small) customer."). Accordingly, the Court reaffirms its holding in *Trinko I* that the duties imposed on carriers by section 202(a) apply only to those to whom that carrier provides service. 123 F. Supp. 2d at 744-45. Thus, the Trinko partnership's section 202(a) claims are based on "damages resulting from a violation of a third party's rights" and must be dismissed. *Id.* at 744 (quoting *Wight v. Bankamerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000).

B. *The Sherman Act Claim*

The gravamen of the Trinko partnership's repled Sherman Act claim is identical to that of the claim dismissed in *Trinko I*: Bell Atlantic breached its agreements with CLECs entered into pursuant to 47 U.S.C. §§ 251 and 252 for the purpose of hindering the CLECs ability to compete in the market for local telephone service. At its core, the partnership's claim is that "when a firm with enough market power breached the terms of contracts it has with competitors that assist those competitors . . . and it does so with the intent to hinder the ability of those competitors to compete in that market, it violates section 2 of the Sherman Act." Pl.'s Mem. at 6.

As the Court has previously noted, however, "even a monopolist . . . has no general duty under the antitrust laws to cooperate with competitors." *Trinko I*, 123 F. Supp. 2d at 741-42 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472, U.S. 585, 600 (1985); *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988)). Similarly, there is no general duty that requires a monopolist who has given assistance to a competitor to continue that assistance. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.* 797 F.2d 370, 376 (7th Cir.

1986). Thus, Bell Atlantic's breaches of its contracts with CLECs, even if true, were not "anticompetitive" conduct within the meaning of the antitrust laws. *See id.* at 377-78.

The Trinko partnership's reliance on *Tops Markets, Inc. v, Quality Markets, Inc.* 142 F.3d 90 (2d Cir. 1998), is misplaced. *Tops Markets* involved a firm's attempt to monopolize the local market for supermarkets by interfering with a competitor's contract with a third party, and, thus, does not support the partnership's argument that a monopolist's breach of its own contracts with competitors is anticompetitive conduct.

Nor is this Judge Posner's hypothetical case of a monopolist "entic[ing] new firms into its market only to destroy them and so deter other firms from trying to enter." *See Olympia Equip.*, 797 F.2d at 376. Bell Atlantic entered into the agreements at issue because it was required to do so by the Communications Act, and there is no allegation that it had either the intent or the ability to "destroy" CLECs such as AT & T.

Anticompetitive conduct is an element of both a monopolization claim and an attempted monopolization claim pursuant to section 2 of the Sherman Act. *See Invamed, Inc, v. Barr Labs., Inc.*, 22 F. Supp. 2d 210, 218-19 (S.D.N.Y. 1998). Because the Trinko partnership has failed to allege any anticompetitive conduct on the part of Bell Atlantic, its Sherman Act claim must be dismissed. *Id.* at 219.

C. *Tortious Interference Claim*

As this Court has dismissed all of plaintiffs federal claims, there remains no independent basis for original federal jurisdiction over the remaining state law claim for tortious interference. That claim, therefore, is dismissed. *See* 28 U.S.C. § 1367(c)(3); *Carnegie-Mellon Univ. v. Cohill*, 484

U.S. 343, 350 (1988); *Baylis v, Marriott Corps.*, 843 F.2d 658, 665 (2d Cir. 1988).

III. CONCLUSION

For the reasons set forth above, the motion to dismiss the amended complaint is granted.

Dated: New York, New York
April 26, 2001

SO ORDERED:

/s/ Sidney H. Stein
SIDNEY H. STEIN, U.S.D.J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed: Oct. 1, 2002]

Dkt. No. 01-7746

LAW OFFICES OF CURTIS V. TRINKO,

Plaintiff-Appellant,

v.

BELL ATLANTIC CORP.,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing *en banc* having been filed herein by the appellee Bell Atlantic Corp.

Upon consideration by the panel that decided the appeals, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing *en banc* been transmitted to the judges for the court in regular active service and to and other judge that heard the appeal and that no such judge has requested that a vote be taken theron.

FOR THE COURT

Roseann B. Mackechine Clerk

APPENDIX E

STATUTORY APPENDIX

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> "**Monopolizing trade a felony; penalty.** Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony * * *."

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> "**Suits by persons injured.** (a) Amount of recovery; prejudgment interest. Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 202 of the Communications Act, 47 U.S.C. § 202(a), provides:

> "**Discriminations and preferences.** (a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or

> locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

Section 206 of the Communications Act, 47 U.S.C. § 206, provides:

> "**Carriers' liability for damages.** In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 207 of the Communications Act, 47 U.S.C. § 207, provides:

> "**Recovery of damages.** Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies."

Section 251 of the Communications Act, 47 U.S.C. § 251, as added by the Telecommunications Act of 1996, as amended, provides:

> "**Interconnection**
>
> **(a) General duty of telecommunications carriers**

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the Interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the

State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title."

Section 252 of the Communications Act, 47 U.S.C. § 252, provides:

"Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local

exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls

that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court

shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term 'incumbent local exchange carrier' has the meaning provided in section 251(h) of this title."

Section 253 of the Communications Act, 47 U.S.C. § 253, provides:

"Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services."

Section 271 of the Communications Act, 47 U.S.C. § 271, provides:

"Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in

subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is

providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section

252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to Commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity

in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) Definition of incidental interLATA services

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programing, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services provided under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those interLATA

transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section—

(1) In-region State

The term 'in-region State' means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term 'audio programming services' means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms 'video programming service' and 'other programming services' have the same meanings as such terms have under section 522 of this title.

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier, shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section."

Section 601(b) of the Telecommunications Act of 1996, codified in Section 152 note of the Communications Act, 47 U.S.C. § 152 note, provides:

"**(b) Antitrust laws.—**

(1) Savings clause.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act [Telecommunications Act of 1996, Pub.L. 104-104, Feb. 8, 1996, 110 Stat. 56, for distribution of which see Short Title note set out under section 609 of this title] shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(2) Repeal.—[Par. (2) repealed subsection (a) of section 221 of this title].

(3) Clayton Act.—[Par. (3) amended section 18 of Title 15, Commerce and Trade]."

No. 02-682

Supreme Court, U.S.
FILED
DEC 13 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether under the standards applicable to a motion to dismiss, the Second Circuit correctly concluded that allegations of predatory actions by a local telephone monopolist regulated by the market opening provisions of the Telecommunications Act of 1996 suffice to state a claim under Section 2 of the Sherman Act?

2. Did the Second Circuit correctly conclude that a customer of a competitive local exchange carrier has standing under the antitrust laws and the Communications Act to challenge an incumbent local exchange carrier's anti-competitive discrimination against the competitive carrier that resulted in distinct and unique injuries to the customer?

RULE 29.6 STATEMENT

Respondent is a limited-liability partnership organized under the laws of the State of New York. It has no parent corporation, and no publicly-held firm owns a 10% or more interest in it.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Law Offices of Curtis V. Trinko requests that this Court deny the Petition for a Writ of Certiorari ("Pet.") filed by Verizon Communications Inc. to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

COUNTER-STATEMENT OF THE CASE

The telecommunications industry, which continues to move from a model based on monopoly to one based on competition, has long been subject to antitrust oversight. During the 1970s and 1980s in particular, both the Justice Department and private parties used the antitrust laws to challenge AT&T's practices related to its control of the local network to exclude rivals, particularly in the long distance and equipment manufacturing markets. *See, e.g., MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1982) (assigning liability based on AT&T exclusionary practices as to long distance competitors), *cert. denied*, 464 U.S. 891 (1983); *Litton Systems, Inc. v. AT&T Co.*, 700 F.2d 785, 815 (2d Cir.1983) (AT&T's predatory practices in relation to rivals in the equipment manufacturing market gave rise to antitrust liability), *cert. denied*, 464 U.S. 1073 (1984). Eventually, these efforts led to the Modified Final Judgment ("MFJ") entered in *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). The MFJ separated the sale of telephone equipment and long distance services from local telephone services and gave the monopoly control over the vast local telephone network to what were then seven Regional Bell Operating Companies ("RBOCs").

Until 1996, "[s]tates typically granted [each RBOC] an exclusive franchise in each local service area." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999). In 1996, Congress enacted the Telecommunications Act of 1996 ("the Act" or "the Telecommunications Act"),[1] which provided new entrants an opportunity to compete in the long-monopolized market for local telephone service. In so doing, the Act made clear that the antitrust laws would continue to govern industry. *See* Pub. L. 104-104, Title VI, § 601(b)(1), 110 Stat. 56, 143 ("[N]othing in the Act or in the amendments made by this Act shall be construed to modify, impair or supercede the applicability of any antitrust laws."); *see also* H.R. CONF. REP. NO. 104-458, at 201 (1996) (explaining that this clause "prevents affected parties from asserting that the [Act] impliedly preempts other laws").

In opening the local telephone market to competition, Congress both preempted legal barriers to entry, such as exclusive franchises for local service areas, and imposed certain obligations on incumbent local exchange carriers (or "ILECs," as they are often called).[2] These obligations envisioned three alternative paths for entry: (1) wholly facilities-based providers that would "interconnect" their networks with the incumbent's network; (2) partially facilities-based providers that would, to supplement their own facilities, rent "unbundled network elements" from the ILEC, such as the line to a subscriber's home from the central office (or the "local loop," as it is called); or (3) resellers, which would provide the same service offered by the ILEC to their customers by buying the service at wholesale and selling it at retail. Regardless of the mode of entry used, firms taking advantage of the opportunity

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[1] Act of Feb. 8, 1996, Pub. L. 104-104, Title VI, 110 Stat. 56.

[2] An ILEC is defined in Section 251(h)(1) of the Telecommunications Act, 47 U.S.C. § 251(h)(1).

afforded by the Telecommunications Act are known as competitive local exchange carriers, or "CLECs."

This case involves the actions of Verizon Communications Inc. (through its predecessor Bell Atlantic, the defendant and appellee below) ("Verizon"), which continues to enjoy a monopoly in local telephone service. As alleged in the complaint, Verizon engaged in a course of conduct in the wake of the Telecommunications Act that was designed to exclude CLECs from the local telephone market. In general, the complaint focused on Verizon's refusal to provide equal access to its network, including (1) allowing customers to switch from its network to a CLEC's without losing service for long periods of time; and (2) enabling customers of a CLEC to call subscribers on Verizon's network without a degradation of service quality. In addition, as the complaint explained, Verizon "delayed filling orders of CLECs' customers, but not those of its own customers, or failed to fill orders for CLECs' customers at all." *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.* 309 F. 3d 71, 73 (2d Cir. 2002) (Sack, J., concurring in part and dissenting in part), App. at 43a. Similarly, the complaint alleged that Verizon had refused to provide competitors with access to essential facilities, such as "the local loop," on a reasonable basis. Finally, the complaint alleged that these anticompetitive practices did not result from any "valid business reason and [were] intended to exclude competition from the market." *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 95 (2d Cir. 2002), App. at 6a-7a.

Law Offices of Curtis V. Trinko, LLP ("Trinko"), which sought to benefit from the opportunity to select a competitor of Verizon's for local telephone service, brought this action on its own behalf and on behalf of the class of similarly situated consumers in order to remedy the injuries they suffered from Verizon's anticompetitive course of conduct. In particular, Trinko alleged in its complaint that it endured degraded

telephone service as a direct result of Verizon's predatory practices towards its competitors in the local telephone market. *See Trinko*, 305 F.3d at 95, App. at 6a-7a. By raising the costs and degrading the quality of, or denying, telephone service provided by CLECs, Verizon encouraged customers to switch back to it for service or, in many cases, not to move to a CLEC at all. *See id.* at 106, App. at 27a.

In its decision below, the Court of Appeals for the Second Circuit decided that Trinko's claims for relief under Section 2 of the Sherman Act and Section 202(a) of the Communications Act withstood Verizon's motion to dismiss for failure to state a claim. *See Trinko*, 305 F.3d 89, App at 1a. In so doing, the Second Circuit agreed with the Seventh Circuit's decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), which held that merely pleading a violation of the Telecommunications Act does not state a claim for relief under the Sherman Act. *See Trinko,* 305 F.3d at 109-10, App. at 31a-34a. Moreover, the Second Circuit also stressed that the allegations pled in the instant case are not immunized from antitrust review by regulation, but rather represent just the type of conduct that antitrust courts have judged previously to fall within the scrutiny of the Sherman Act. *See id.* at 109, App. at 32a (citing *Northeastern Tel. Co. v. AT&T Co.*, 651 F.2d 76, 82-83 (2d Cir. 1981)). In the wake of the Second Circuit's decision, the Eleventh Circuit also ruled, in accordance with the views offered by the United States and the Federal Communications Commission ("FCC"), that an antitrust action can challenge predatory conduct taken by an ILEC as long as the complaint specifies a basis for antitrust liability other than a mere violation of the Telecommunication Act. *See Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1282 n.8 (11th Cir. 2002), *pet. for rehearing pending*.

REASONS FOR DENYING THE WRIT

To avoid facing discovery and judicial scrutiny of its challenged practices regarding how it excluded rivals from the local telephone market, Verizon has offered a series of creative legal arguments touching on four distinct questions of antitrust law. In essence, Verizon seeks to obscure that the Second Circuit's decision in this case does not conflict with the Seventh Circuit's decision in *Goldwasser* and that this case constitutes a routine antitrust action to remedy misconduct that injured consumers. Moreover, because the Petition does not challenge any ruling on the basis of a developed factual record, it does not present this Court with an appropriate opportunity to evaluate whether any special antitrust rules are appropriate in the context of the local telecommunications market. Finally, Verizon's challenge to the Second Circuit's standing rulings raise no issue worthy of this Court's attention.

I. THE SECOND CIRCUIT'S DECISION DOES NOT RAISE A CIRCUIT CONFLICT AND FOLLOWS WELL ESTABLISHED PRINCIPLES OF ANTITRUST LAW

The Second Circuit's decision below does not raise a conflict with the Seventh Circuit's decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). In *Goldwasser*, the Seventh Circuit held that if an antitrust plaintiff merely complains of violations of the Telecommunications Act, the case should be dismissed for failure to plead an actionable antitrust claim. *See* 222 F.3d at 400-01. In this case, the Second Circuit considered a different set of factual allegations – i.e., ones that did not simply rely on violations of the Telecommunications Act – and held that a plaintiff who pled facts sufficient to defeat a motion to dismiss under traditional antitrust principles should not be denied an opportunity to proceed simply because some of the conduct at

issue also related to requirements imposed by the Telecommunications Act. *See Trinko*, 305 F.3d at 109, App. at 31a. In short, nothing in the Second Circuit's opinion in this case suggests that it would have treated the complaint in *Goldwasser* any differently than the Seventh Circuit did, and nothing in *Goldwasser* suggests that the Seventh Circuit would have dismissed the complaint in this case as facially inadequate.

A. The Decision Below Is Consistent With *Goldwasser*'s Holding That A Failure To Comply With The Telecommunications Act Is Not Itself An Antitrust Violation

In *Goldwasser*, the Seventh Circuit evaluated an antitrust complaint that "focuse[d] tightly" on the violation of the market opening requirements imposed on incumbent local telephone providers by the Telecommunications Act. 222 F.3d at 394-95. In particular, the plaintiffs in *Goldwasser* maintained that "Ameritech's alleged failure to comply with the 1996 Act [was], in itself, also an antitrust violation." *Id.* at 396. In rejecting that argument, the Seventh Circuit concluded that it was "both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws." *Id.* at 400. In so doing, the Seventh Circuit explained that plaintiffs must state clearly how anticompetitive actions taken by an incumbent local telephone provider violated the antitrust laws in order to state a claim for antitrust relief. Significantly, the Seventh Circuit made clear that the Telecommunications Act did not impliedly repeal the antitrust laws, underscoring that the Telecommunications Act itself contained a savings clause that preserved antitrust oversight over the telecommunications industry. *See id.* at 401 ("Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law.").

To read *Goldwasser* as establishing what amounts in substance to a rule of antitrust immunity overlooks not only its insistence to the contrary, but suggests that *Goldwasser* overruled, *sub silencio*, the Seventh Circuit's earlier decision in *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983). In *MCI*, the Seventh Circuit concluded that AT&T had violated the antitrust laws by failing to cooperate with MCI on reasonable terms for "handing off" the telephone calls from its local lines to MCI's long distance lines. *Id.* at 1150-51. This conclusion acknowledged that the Communications Act of 1934 authorized the FCC to regulate the terms and conditions of "interconnection," which was at the heart of MCI's antitrust case against AT&T. *See* 47 U.S.C. § 201(a). In particular, the Seventh Circuit rejected AT&T's argument that the FCC's regulatory authority in this area displaced the need for antitrust oversight. *See MCI*, 708 F.2d at 1102-03. In so doing, it noted that the great weight of authority supported its conclusion that antitrust law should work in tandem with – and not be displaced by – a procompetitive regulatory regime. *Id.* at 1103 (citing, among other sources, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973)). Indeed, the fact that Verizon goes to great lengths to distinguish *MCI* only underscores the significance and relevance of that case. *See* Pet. at 16-18 and 12 n.6.[3]

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[3] To distinguish *MCI*, Verizon offers a number of erroneous arguments. First, Verizon maintains that in *MCI* the challenged conduct related to assistance provided "voluntarily" by AT&T. *Id.* at 16. Second, Verizon suggests that the nature of the cooperation provided by AT&T differs substantially from the type of cooperation involved in the instant case. *Id.* at 17-18. As to AT&T's conduct with respect to interconnection, not only had the FCC undertaken a number of regulatory initiatives in this regard that governed AT&T's behavior, but AT&T argued that the FCC's authority and oversight barred antitrust liability. *See* 708 F.2d at 1102-03, 1131-37. As to the type of cooperation, this case involves very similar issues to *MCI* in that it also involves issues related to the "interconnection" of rival networks.

In a recent brief to the Eleventh Circuit as *amicus curiae*, the United States and the Federal Communications Commission emphasized the point that the only viable and sensible interpretation of *Goldwasser* is that it held that plaintiffs who challenge actions by incumbent local exchange carriers must allege more than violations of the Telecommunications Act to state a claim for relief under the Sherman Act. First, they explained that the Telecommunications Act contains two "savings clauses" that make clear that the Act's regulatory regime does not displace antitrust law. *See* Brief For the United States and Federal Communications Commission as Amici Curiae, *Covad Communications Co. et al. v. BellSouth Corp. et al.*, at 13 (December 17, 2001), *available at* http://www.usdoj.gov/atr/cases/f9700/9708.pdf (hereafter "U.S. Brief") (citing Pub. L. No. 104-104, Title VI, § 601(c)(1), 110 Stat. 56, 143 (general savings clause) and Pub. L. No. 104-104, Title VI, § 601(b)(1), 110 Stat. 56, 143 (antitrust savings clause)).

Second, they emphasized that both the Act's legislative history and its implementing regulations acknowledge the role for antitrust oversight. *See id.* at 14-15 (citing, among other sources, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 61 Fed. Reg. 45476, 45494 (1996) ("nothing in . . . our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws")); *see also* S. REP. NO. 104-23, at 17 (1995) (Senate Bill explanation that "the provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill.").[4] Finally, they

[4] The applicability of the antitrust laws was also a theme in President Clinton's signing statement:

> The [Telecommunication] Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rule-making or orders, the antitrust laws continue to apply fully.

Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (February 8, 1996), *reprinted in* 1996 U.S.C.C.A.N. 228-1, 228-3.

underscored that there is no conflict between the two statutory regimes that would give rise to an implied immunity defense. *See id.* 21-22.[5]

Rather than focus on *Goldwasser*'s holding, Verizon seizes on ambiguous dicta to support its claim of a circuit conflict. In particular, Verizon focuses on *Goldwasser*'s suggestion that "[t]he antitrust laws would add nothing to the oversight already available under the 1996 law," 222 F.3d at 401, downplaying *Goldwasser*'s explicit acknowledgment immediately after that statement that the Telecommunications Act does not supplant antitrust oversight, *see id.* at 401. Whatever this dicta may mean,[6] it provides no warrant to review this

[5] The government's brief to the Eleventh Circuit in an earlier case also noted how, in the context of asking for regulatory permission to enter new markets, Bell Companies have explained that the possibility of antitrust liability constitutes a formidable deterrent against anticompetitive conduct. *See* Brief For the United States and Federal Communications Commission As Amicus Curiae In Support of Appellants, *Intermedia Communications, Inc. v. BellSouth Telecommunications, Inc.*, at 12-13 (March 28, 2001) (available at http://www.usdoj.gov/atr/cases/f7700/ 7777.pdf).

[6] Perhaps the best reading of the dicta seized on by Verizon is that courts hearing antitrust claims in the telecommunications context should take the Act's regulatory machinery into account in crafting appropriate relief. *See* U.S. Brief at 18-19 (suggesting this interpretation). Alternatively, the sentiment singled out by Verizon may simply be "misleading dicta" that has enabled the defenders of the incumbent providers to press for a much broader shield against antitrust liability than that contemplated by the *Goldwasser* court. *Cf. Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 621 (2001) (noting unintended effect of "misleading dicta").

case. In particular, the Second Circuit properly distinguished *Goldwasser*, explaining that "the claim [in *Goldwasser*] was merely an allegation that the Telecommunications Act was violated and not a freestanding antitrust action." *Trinko*, 305 F.3d at 109, App. at 31a; *see also Covad Communications*, 299 F.3d at 1282 n.8 (rejecting broad reading of dicta in *Goldwasser* and noting *Goldwasser* "tied its conclusion to the specific allegations of the complaint in that case"). Thus, unless another Court of Appeals adopts the expansive reading of *Goldwasser* advanced by Verizon here – i.e., that all antitrust actions are displaced if they relate to the Telecommunications Act's requirements – there is no conflict that warrants the attention of this Court.

B. Antitrust Law Provides A Right Of Action Against A Monopolist Who Deals With Competitors In A Predatory Fashion

On Petitioner's version of *Goldwasser*'s holding, antitrust law does not impose any affirmative obligations on monopolists' dealings with competitors. This misstates the law. As this Court has repeatedly made clear, there are circumstances where a monopolist's refusal to deal with a rival on reasonably practicable terms violates Section 2 of the Sherman Act. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985); *see also* U.S. Brief at 9 ("[U]nder well established antitrust doctrine, a monopolist's refusal to deal with a rival without a legitimate business justification may, in certain circumstances, violate Section 2 of the Sherman Act."). In particular, as the Seventh Circuit explained in an earlier case, a monopolist violates the antitrust laws where it "refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.), *cert. denied*, 480 U.S. 934 (1987). Or, as this Court put it, if "valid business reasons" do not justify conduct that tends to impair the opportunities of a monopolist's rivals, that conduct can be condemned as exclusionary and violative of Section 2. *See Eastman Kodak*, 504 U.S. at 483; *Aspen*, 472 U.S. at 605; *see also Trinko*, 305 F.3d at 107-08, App. at 28a-31a (same).

Before the breakup of the Bell System, there were a series of antitrust cases that focused on the anticompetitive actions by AT&T towards would-be competitors, particularly in the long distance and equipment manufacturing markets. For both rival long distance firms (like MCI) and equipment manufacturers (like Litton), AT&T's control over access to local telephone lines enabled it to impede entry by refusing to provide reasonable interconnection arrangements to alternative telephone equipment manufacturers or rival long distance networks. *See, e.g., MCI*, 708 F.2d at 1150-51 (holding AT&T liable for predatory conduct in long distance market); *Litton Systems, Inc.*, 700 F.2d at 814-15 (holding AT&T liable for predatory conduct in telephone equipment market). –AT&T's series of anticompetitive maneuvers led to a spate of antitrust suits (including one by the United States), which ultimately yielded important pro-competitive results. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982) (entering consent decree to break up Bell System as of January 1, 1984), *aff'd*, 460 U.S. 1001 (1984); Roger Noll & Bruce Owen, *The Anticompetitive Uses of Regulation: United States v. AT&T*, in THE ANTITRUST REVOLUTION 290 (J.E. Kwoka & Lawrence J. White eds., 1989). In practice, these antitrust actions worked in tandem with the existing regulatory regime to advance the goals of "other regulatory efforts that attempted to create interconnection rights for non-Bell long-distance carriers." James B. Speta, *A Common Carrier Approach To Internet Interconnection*, 54 FED. COMM. L.J. 225, 266 (2002).

Before the Telecommunications Act, many states legally prevented potential entrants from competing to provide local telephone service. The Act, in addition to preempting legal barriers to entry (47 U.S.C. § 253), required the ILECs to, among other things, interconnect with rival networks and lease access to elements of the network (such as the local loop). *See* 47 U.S.C. § 251. In so doing, the Telecommunications Act, at least from an antitrust perspective, changed the facts of "market life." *MCI*, 708 F.3d at 1105; *see also United States v. Marine Bancorporation*, 418 U.S. 602, 627 (1974) (antitrust analysis of bank mergers "must take into account the unique federal and state" regulation). Consequently, the drafters of the Telecommunications Act self-consciously created conditions that would give rise to antitrust claims – just as had occurred once regulation and technology facilitated entry into the previously monopolized long distance and equipment manufacturing markets. *See* Pub. L. No. 104-104, Title VI, § 601(b)(1), 110 Stat. 56, 143 ("nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.").[7]

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[7] As Senator Thurmond underscored during the Senate debate:

> Today we take for granted that the antitrust laws apply to the communications sector. During the Antitrust Division's antitrust case in the 1970s against the Bell system, however, some argued that the existence of FCC regulations displaced the antitrust laws and made them inapplicable. The courts emphatically rejected that challenge then, and the antitrust savings clause in the bill today makes clear that that question cannot be reopened. A strong, competitive communications sector is essential to continued American prosperity in the next century. Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation it fosters, can flourish to benefit consumers and the economy.

142 CONG. REC. S711 (daily ed. Feb. 1, 1996) (statement of Sen. Thurmond).

Under ordinary antitrust principles, the possibility that Verizon violated the Telecommunications Act does not shield it from antitrust scrutiny based on the same conduct. Similarly, for example, simply because a case implicates claims addressable under state tort law, a plaintiff is not barred from seeking antitrust remedies. *See, e.g., Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 783-84 (6th Cir. 2002). Consequently, the Second Circuit's decision below followed well-established antitrust principles in concluding that "the fact that [an antitrust complaint] resembles an action brought under another statute in itself is unproblematic." 305 F.3d at 109, App. at 32a.

C. This Case Presents An Inappropriate Context To Examine The Issue Of How Antitrust Law Relates to Telecommunications Regulation

The precise nature and scope of antitrust liability arising from a local telephone monopolist's predatory conduct should be defined based on an actual holding of liability and a developed record. To enlist the interest of this Court, Verizon maintains that the Second Circuit's decision "extends [Section 2] duties beyond any previous holding of liability." Pet. at 16. This suggestion, however, rests on a misrepresentation of the relevant facts and legal backdrop.

The contours of Section 2 liability, as this Court made clear in *Aspen*, focus on the elements of "exclusionary" conduct and the presence (or lack thereof) of a "legitimate business justification." *See Aspen*, 472 U.S. at 604-05. In this case, the Second Circuit followed *Aspen*, leaving for factual development the questions of whether Verizon's conduct was anticompetitive and/or justified by a legitimate business purpose. *See Trinko*, 305 F.3d at 107-09, App. at 28a-31a. This approach, contrary to Verizon's suggestion, neither

invented a new antitrust theory nor actually assigned liability to Verizon. Rather, it allowed the case to move forward towards discovery and the summary judgment stage. *See id.* at 108, App. at 31a.

To the extent that the Telecommunications Act's regulatory regime is relevant to antitrust cases such as this one, it is in evaluating the legitimacy of a business justification for an exclusionary practice. In the litigation against AT&T, for example, the Seventh Circuit concluded that "[i]n the particular context of an industry subject to extensive and rapidly changing regulatory demands, we believe that an antitrust defendant is entitled both to raise and to have the jury consider its good faith adherence to regulatory obligations as a legitimate antitrust defense." *MCI*, 708 F.2d at 1109-10; *see also City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, 653 (10th Cir. 1992) (pipeline company's denial of access to other gas suppliers backed by legitimate business purpose in light of regulatory history in natural gas industry), *cert. denied*, 506 U.S. 831 (1992). Similarly, as a question of fact in this case, Verizon could argue, for example, that its practices related to how customers are treated when they switch to an alternative carrier are justified by state or federal regulation (e.g., because regulators required the procedure at issue).

The relevance of regulation in assessing the legitimacy of a challenged practice (as a "fact of market life," *MCI*, 708 F.2d at 1105) can be judged only on a complete factual record. In the antitrust case brought by *Litton*, for example, the Second Circuit rejected, after a trial, that regulation fully addressed the possibility of anticompetitive conduct and condoned the challenged practice. *See Litton*, 700 F.2d at 811-12. By contrast, in *Town of Concord v. Boston Edison Co.*, also after a full trial, the First Circuit concluded that there existed powerful reasons to conclude that no competitive harm escaped the attention of regulators in the very unique circumstances of that case. 915

F.2d 17, 26-28 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991).[8] Significantly, both *Litton* and *Town of Concord* emphasize that antitrust scrutiny should generally complement regulation and not bar antitrust claims related to regulated conduct; rather, courts should evaluate the nature of regulation – and its effectiveness – in judging the merits of an antitrust claim on a complete record. *See United States v. Western Electric Co.*, 900 F.2d 283, 298 (D.C. Cir. 1990) (simply assuming effectiveness of regulation would be "an abdication of judicial responsibility"). As the Second Circuit correctly recognized in this case, where there has been no factual development on the impact of regulation or its effectiveness, it would be inappropriate to rule out the possibility of antitrust liability. *See Trinko*, 305 F.3d at 112 n.17, App. at 37a.

II. THE SECOND CIRCUIT'S TREATMENT ON THE ESSENTIAL FACILITIES AND THE MONOPOLY LEVERAGING CLAIMS ARE NOT APPROPRIATE FOR REVIEW

Verizon's petition suggests that this Court should review the Second Circuit's treatment of the essential facilities doctrine and monopoly leveraging theory. Even if these issues were worthy of this Court's attention, this case would present an especially inappropriate one to examine the relevant issues.

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[8] *Town of Concord* involved the unique scenario of a "price squeeze" allegation where an antitrust court would necessarily have to second guess the price setting decisions made by a regulatory body. This circumstance, as the Second Circuit recognized, differs greatly from the allegations in the instant case relating to equal access to networks and an incumbent's base of customers. *See Trinko*, 305 F.3d at 112 n.17, App. at 37a.

A. This Case Provides An Inappropriate Vehicle To Review The Monopoly Leveraging Theory

Regardless of the status of the monopoly leveraging theory in the lower courts, this is an inopportune case to consider the nature of this doctrine. Significantly, this case arises in a regulated industry, which presents a context that heightens the concern about leveraging monopoly power from one market into another to gain an unfair competitive advantage. In particular, even those critical of monopoly leveraging arguments in other contexts acknowledge that "monopoly leveraging has rightly been a concern where natural monopoly prevails, principally because the monopolists have been rate-regulated." James B. Speta, *Tying, Essential Facilities, and Network Externalities: A Comment on Piraino*, 93 NW. U. L. REV. 1277, 1280 (1999).[9]

In addition to the uniqueness of leveraging claims raised in the context of regulated industries, there are three additional reasons that this case presents a poor vehicle for the Court to examine the monopoly leveraging issue. First, this case raises a number of antitrust theories, so consideration of the monopoly leveraging theory would constitute a review of the lower court's *opinion*, not its *judgment* that the complaint states a

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[9] In her opinion in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, Justice O'Connor explained, in the context of a tying case, the logic behind why a regulated industry presents a scenerio where leveraging claims would be particularly compelling:

> In a regulated industry a firm with market power may be unable to extract a [monopoly] profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services.

466 U.S. 2, 36 n.4 (1984) (O'Connor, J, joined by Powell, J. and Rehnquist, C.J., concurring in result) (citation omitted).

viable claim for relief under Section 2 of the Sherman Act. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (the Court "reviews judgments, not opinions") (footnote omitted). Second, this case is still at an initial stage, so the Court would not have the benefit of a complete record that could provide critically important perspective on the merits and role of a monopoly leveraging theory apart from that afforded by other antitrust theories. Finally, it behooves the Court to wait until an actual case assigns antitrust liability based on a leveraging theory alone (as opposed to other available theories) so that it can better judge whether this theory should be endorsed as a distinct basis for liability.

B. The Essential Facilities Claim Is Inappropriate For Review

Verizon emphasizes that "[t]his Court has never recognized the essential facilities doctrine," (Pet. at 16), but fails to mention that every federal circuit has done so. *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Comm. Sys. Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI*, 708 F.2d at 1132-33; *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communi-*

cations, 299 F.3d at 1285-88; *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-57 (Fed. Cir. 1999).

Despite Verizon's focus on a selective sampling of the academic commentary, there is strong support for the view that this Court's cases – as suggested by the lower courts' decisions – provide for an essential facilities claim under Section 2 of the Sherman Act. In particular, the circuit courts and prominent antitrust authorities have regarded this Court's decision in *Otter Tail Power Co. v. United States* as contemplating the possibility that "a firm which controls a facility essential to its competitors may be guilty of monopolization if it refuses to allow them access to the facility." *Olympia*, 797 F.2d at 376 (Posner, J.) (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378-79 (1973)); *see also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 388 (adverting to "essential facilities" doctrine, pressed on the Court by incumbent providers as appropriate standard for defining the "unbundling" requirements of local telephone providers). Significantly, even those commentators who are critical of the doctrine acknowledge that, at least in the context of a regulated industry where a regulatory authority can superintend the relief – as was the case in *Otter Tail*, for example – the doctrine is relatively unobjectionable. *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989) (essential facility doctrine may be practical "when, as in *Otter Tail*, a regulatory agency already exists to control the terms of dealing"). Thus, if this Court were to review this doctrine, it would make sense to do so in a context where no regulatory agency could superintend the relevant terms of dealing.

Verizon also paints a misleading and inaccurate picture when it suggests that the Second Circuit took an unprecedented step in contemplating the possibility of antitrust liability based on the provision of terms of access that were unjustifiably

degraded (as opposed to denied entirely). First, as a matter of the competitive effects of providing or denying access, it is quite clear that a sufficiently degraded form of access can be equivalent to providing no access at all. As the FCC has noted (and facts would explicate), in this field even minor delays in interconnecting "can represent a serious and damaging business impediment to competitive market entrants." Second Report and Order, *In re Implementation of the Telecommunications Act of 1996*, 13 F.C.C.R. 17,018, at ¶ 3 (1998). Second, and following this principle, a number of lower courts have concluded – as the Second Circuit contemplated – that the relevant standard for the essential facilities doctrine is whether the monopolist allowed access "on reasonable terms, equivalent to a denial of access." *City of Chanute*, 955 F.2d at 648 (citing *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912)); *see also Delaware & Hudson Ry. Co.*, 902 F.2d at 179-80 (essential facilities doctrine does not require an outright refusal, as a claim is stated when "the terms of the offer to deal are unreasonable"). This approach flows from the standard outlined in the *Terminal Railroad* case, which has provided a valuable guide to the lower courts in devising the contours of the doctrine: access to an essential facility should "'place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.'" *City of Chanute*, 955 F. 2d at 648 (quoting *Terminal R.R.*, 224 U.S. at 411).

Finally, as noted above with respect to the monopoly leveraging issue, there are a series of reasons why, even if the Court were interested in reviewing the essential facilities issue, this case would be a poor vehicle for doing so. Indeed, the need for factual development to guide the Court's consideration of legal issues is particularly acute as to the essential facilities doctrine. Mindful of this point, the Second Circuit highlighted that questions like whether the local loop is an essential facility or whether interconnection arrangements

were reasonable are heavily fact-intensive and should thus be evaluated in the first instance by a finder of fact. *See Trinko*, 305 F.3d at 108, App. at 29a-30a. Consequently, this Court should decline to address such issues on the undeveloped record in the instant case.

III. THE STANDING RULINGS RAISE NO NOVEL ISSUES AND DO NOT MERIT THIS COURT'S REVIEW

The Second Circuit's conclusion that Trinko has standing to assert its claims under the Sherman Act and Communications Act is consistent with this Court's precedents. As the Second Circuit's rulings do not conflict with this Court's – or indeed any other circuit court's – decisions, they do not merit review.

A. Trinko's Standing To Assert Sherman Act Violations Reflects The Application of Well Settled Legal Principles

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), this Court clarified the Sherman Act's scope of protection for injured parties. *McCready* presented the question of whether subscribers of a group health plan, who were injured by an antitrust conspiracy aimed at psychologists (who would, in turn, provide care to the subscribers), had standing to litigate an antitrust action. This Court answered that question in unmistakably clear terms: "Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." *Id.* at 479. This conclusion followed naturally from the Sherman Act's "expansive remedial purpose" that intended to "provide ample compensation to the victims of antitrust violations." *Id.* at 472 (internal quotations and citations omitted).

In its decision below, the Second Circuit applied *McCready* to the facts of the instant case. As in *McCready*, the relevant antitrust violation by Verizon focused not on customers like Trinko, but on entrants into the market for local telephone service. In particular, customers of the new entrants, although not the immediate target of the antitrust violation, suffered in the same manner as the health plan subscribers in *McCready*, *id.* at 483, as they faced degraded service on account of Verizon's predatory practices. As the Second Circuit put it:

> As a result of an alleged monopoly scheme, the plaintiff in this case had a similar set of choices [to the plaintiff in *McCready*]: (1) stay with AT&T and receive inferior local service; or (2) switch to Bell Atlantic. While the second choice would hurt AT&T as a competitor, the first choice directly injures the plaintiff as a consumer. In this case, the plaintiff made the first choice and suffered the requisite antitrust injury.

Trinko, 305 F.3d at 106, App. at 27a.

Verizon attempts to portray this case as something other than a routine application of *McCready* by claiming that the injury in that case was "direct" because the "defendant refused to pay her." Pet. at 24-25. This ground for distinguishing *McCready* is unconvincing. In *Associated General Contractors v. California State Council of Carpenters*, an antitrust standing case in the wake of *McCready*, this Court expressly declined to impose any such requirement and instead concluded that the issue of standing rests on a fact-specific judgment. *See* 459 U.S. 519, 536-37 (1983). In particular, this Court explained that a direct injury results when the harm from the violation falls within a multi-factor, fact-specific test, even if the injured party did not deal directly with the antitrust

defendant or was not the immediate victim of the violation. *See id.* at 540-41.

B. The Question of Standing Under The Communications Act Does Not Merit The Attention of This Court

The Second Circuit concluded in its decision below that because the Communications Act is "broadly written," any person injured by a violation of the Act has a right of action under the Act to recover for damages. *See Trinko*, 305 F.3d at 98, App. at 11a-12a. Notably, Verizon again fails to offer any cases that hold to the contrary.

To challenge the Second Circuit's conclusion, Verizon claims that Trinko's injury is not sufficiently "direct." There is nothing about Trinko's injury, however, that is "wholly derivative" of the injuries suffered by the competitive provider who offered Trinko telephone service. That is, Trinko – and similarly situated customers of competitive providers – suffer a discrete and direct injury on account of predatory practices that degrade their service above and beyond the injury suffered by the CLEC whose business suffers from those predatory practices. As the Second Circuit put it in rejecting Verizon's standing argument, "'the harm that these customers are alleging – damages resulting from poorer service than they would otherwise have received had Bell Atlantic acted lawfully – is wholly distinct from the harm suffered by the competitors.'" *Trinko*, 305 F.3d at 100, App. at 15a (quoting *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 123 F. Supp. 2d 738, 741 (S.D.N.Y. 2000), App. at 53a-54a).

In short, the issue of standing under the Communications Act is not one that this Court should consider at this time. At present, there is precious little authority on this topic and, in the wake of the Telecommunications Act, the lower courts may

finally have occasion to interpret the breadth of the Communications Act's ambit of protection. Moreover, even to the extent that courts could conceivably determine that consumers like Trinko bring claims that are wholly derivative, that judgment is one that should be made on a fuller factual basis than available from only a complaint. Indeed, as for the pleadings in the instant case, the allegation of degraded or denied telephone service suffices as a basis to proceed towards summary judgment. Invoking this line of reasoning, the Second Circuit concluded that "[w]hile the district court may find otherwise after discovery and a motion for summary judgment, it is too early to conclude on this record that the plaintiff only suffered a wholly derivative injury." 305 F.3d at 100, App. at 15a-16a (footnote omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

The Second Circuit's ruling in this case makes far-reaching and erroneous law under Section 2 of the Sherman Act, vastly expanding unilateral antitrust duties to assist rivals, in conflict with other circuits' decisions strictly limiting such duties, including, but not only, *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). The Second Circuit's ruling also discards longstanding limits on standing under the Sherman and Communications Acts, newly allowing suit based on indirect injuries (derivative of third parties' harm) and third parties' legal rights. This Court should review both aspects of the decision below, which, in conflict with other decisions, sets unprecedented and dangerous legal standards that, unless promptly corrected, will affect any firm in any industry, not just telecommunications, whose conduct can be challenged within the Second Circuit.

The legal issues squarely presented are important and require no further record development to decide, as *Goldwasser* holds. 222 F.3d at 401. Significantly, the United States and the Federal Trade Commission have taken the initiative to urge review, and, though addressing only the merits question, they do not suggest limitation of the grant to exclude the standing issue.[1] Respondent's arguments opposing review are meritless.

ARGUMENT

1. Respondent first attempts to show that the Second Circuit's decision does not conflict with *Goldwasser*. Opp.

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[1] *See* Nigro, *The Viability of Antitrust Suits in Local Telephony Markets: Developments Since* Goldwasser v. Ameritech, ANTITRUST REPORT 3, 4 (Winter 2003) ("[T]he differences * * * need to be resolved by the Supreme Court, as requested in a recently filed petition for *certiorari*. Until then, the weight of litigation will likely hinder the development of increased investment, innovation, and competition in local telephone markets, and could easily creep into other industries as it already has in the Second Circuit." (footnote omitted)).

5-10. This labored effort cannot withstand a simple reading of *Goldwasser* and the decision of the Second Circuit, which recognized that the cases involved "similar allegations of monopolistic conduct." Pet. App. 31a. The conflict is clear, as the Solicitor General expressly notes, stating that the decision below "conflicts with the decisions of other courts of appeals, including *Goldwasser*." SG Br. 8. Section 2 claims (like respondent's) based on deficient, discriminatory assistance to rivals on the very subjects covered by the new 1996 Act duties (47 U.S.C. § 251) were allowed by the Second Circuit here and rejected (on a motion to dismiss) by the Seventh Circuit in *Goldwasser*. Many such suits have been filed in the Second Circuit since the decision here, whereas none have been filed within the Seventh Circuit since *Goldwasser*.[2]

The *Goldwasser* court, speaking through Judge Diane Wood, was not making only the trivial pleading point that "merely pleading a violation of the Telecommunications Act does not state a claim for relief under the Sherman Act." Opp. 4. Rather, the *Goldwasser* opinion focuses on the *conduct* covered by the relevant 1996 Act provision (§ 251) and holds that such *conduct*—discriminatory assistance to rivals, including (as here) to firms engaged in economic resale—is not actionable under Section 2. *Goldwasser* clearly states its fundamental ruling:

> These are precisely the kinds of affirmative duties to help one's competitors that we have already noted *do not exist under the unadorned antitrust laws*. *** [T]he duties to which plaintiffs refer in paragraphs (1) through (20) of their complaint, which we have set out earlier, *go well beyond anything the antitrust laws would mandate on their own*.

[2] *See* BellSouth, SBC, and U.S. Telecom Ass'n Br. 3 n.2 & 15 n.3 (citing several district courts' reliance on *Goldwasser* to reject claims like respondent's on motions to dismiss and listing newly filed class actions).

222 F.3d at 400 (emphasis added). It is this basic limitation on Section 2 duties that the Second Circuit had to reject to reinstate respondent's claim.[3]

The just-quoted Section 2 ruling of *Goldwasser* applies by its terms to allegations that made no reference whatsoever to the 1996 Act. The last three of the referenced paragraphs (numbers (18) through (20)) alleged, with no dependence on the 1996 Act, that Ameritech failed to provide just, reasonable, non-discriminatory terms for local-market rivals to get access to its network on an unbundled basis; just, reasonable, nondiscriminatory wholesale prices to local-market rivals; and just, reasonable, nondiscriminatory terms for local-market rivals to connect to the local network. 222 F.3d at 395 (quoting complaint). Those allegations, which the *Goldwasser* court dismissed under Section 2, are not allegations that 1996 Act violations automatically constitute antitrust violations; and they are indistinguishable from what respondent describes as its allegations here, which "focused on Verizon's refusal to provide equal access to its network." Opp. 3.[4] The conflict with *Goldwasser* is inescapable.

[3] Only after holding that Section 2 does not require such assistance did the Seventh Circuit bolster its holding by reference to the elaborate regulatory and enforcement regime of the 1996 Act. 222 F.3d at 400-01. Respondent seems to accept that a regulatory regime is relevant to determining the proper scope of antitrust duties (Opp. 12, 14), but the regimes it cites (including those involved in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983)) did not provide the 1996 Act's guarantee, plain on the face of the statute, of prompt, judicially reviewable action on access claims. *See* Pet. 19 n.13. As in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), the regulatory "facts" here are apparent from *legal* sources, requiring no trial.

[4] Although respondent suggests that *Goldwasser*'s holding is at odds with the same court's earlier decision in *MCI*, *see* Opp. 7, in fact *Goldwasser* expressly supports the above-quoted holding with a citation to the part of the *MCI* case (222 F.3d at 400, citing *MCI*, 708 F.2d at 1149) where the Seventh Circuit *rejected* MCI's claim of access to

Indeed, respondent's counsel, in fighting for lead-counsel position against Milberg Weiss (the *Goldwasser* plaintiffs' counsel) in the newly filed class actions, recently acknowledged that the Second Circuit decision here newly allows "antitrust claims that had been blocked previously by *Goldwasser* * * *. [N]one of us would be here but for *Trinko* and after *Goldwasser*." Reply Br. 2, *Twombly v. SBC Comm. Inc.*, Civ. No. 302CV1617 (D. Conn. Dec. 9, 2002).

2. On the merits of the Second Circuit's antitrust ruling, respondent's approach is to re-write that ruling, betraying just how dramatic and wrong are the actual grounds of decision. Opp. 10-14. Respondent pretends that the Second Circuit upheld its complaint under the general monopolization standards defining necessary conditions for predatory conduct; but as the Solicitor General explains (SG Br. 9, 13), the Second Circuit did no such thing. The Second Circuit revived respondent's complaint wholly on the basis of essential facilities and monopoly leveraging standards, articulated without the ordinary Section 2 precondition that unilateral conduct, to be actionable, must "not make economic sense for the defendant but for its elimination or softening of competition." SG Br. 10. The Second Circuit's opinion states simply that "reasonable access" is required where access is essential to competition and that power in one market may not be "used" to "gain a competitive advantage" in another, Pet. App. 29a-30a, and it is those broad legal standards that threaten a wide range of lawful market conduct until corrected.

The Second Circuit's reliance only on essential facilities and monopoly leveraging standards, avoiding reliance on the normal Section 2 requirements, was hardly accidental. As the Solicitor General explains, the conduct alleged here cannot

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same-market facilities (*i.e.*, to AT&T's long-distance facilities). It is that aspect of *MCI*, not the ruling on access to local facilities for the long-distance business, that was relevant in *Goldwasser* and is relevant here. Pet. 12 n.6; *see also* Pet. 16-17 & 19 n.13.

meet the normal necessary condition for illegality, that conduct make sense for the defendant *only* because of monopoly returns from lessened competition. SG Br. 11-16. Incumbents like Verizon are required under the 1996 Act to sacrifice end-user sales and instead provide "access" even to mere economic resellers at steeply discounted rates. *See* Pet. 3 n.1. But the Second Circuit did not and could not condemn even an outright refusal to engage in such profit-sacrificing sales as making no ordinary business sense, as lacking economic sense but for a monopoly-level return. It is granting, not denying, the discounted access at issue that requires a sacrifice that a nonmonopolist would not freely make.[5] Even monopolists are entitled under Section 2 to "whatever rates they can obtain in the marketplace" (SG Br. 11; *see* Pet. 18 n.12 (quoting FCC)), and "[t]he antitrust laws do not require monopolists to sacrifice profits to sell to competitors at a discount." SG Br. 14.

3. Accordingly, the Second Circuit, to reverse the district court's dismissal of respondent's complaint, had no choice but to rely on its free-standing monopoly leveraging and essential facilities theories. Respondent offers virtually no defense of those grounds of decision, instead arguing mainly that they should not be reviewed here and now. Opp. 15-20. But the legal principles established by the Second Circuit's decision make dramatic new law that, until corrected, will be

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[5]In New York, where 25% of the business and residential lines are now served by competitors, about two thirds of the competitors' lines are leased under "unbundled network element" rates. FCC, *Local Telephone Competition: Status as of June 30, 2002*, tables 6, 8 (Dec. 9, 2002), http://ftp.fcc.gov / Bureaus / Common_Carrier /Reports/FCC-State_Link/IAD/lcom1202.pdf. Verizon now leases out those lines at an average of $19.14 per line, giving up the average of $41.98 per line revenue it obtains selling at full retail prices. NYPSC, *Analysis of Local Exchange Service Competition in New York State* 10-12 (2002), www.dps.state.ny.us/telecom/telanalysis.htm; NYPSC, *Press Release*, www.dps.state.ny.us/fileroom/doc11086.pdf.

exploited not only by the actual litigants that have already initiated some 32 class actions against telephone companies (and more against non-telephone companies, *see* UPS Br. 18), but by potential litigants across all industries. It is vital to settle the proper Section 2 standards now, and "further development of a factual record" is not required for that task. *Goldwasser*, 222 F.3d at 401; *see* SG Br. 18-19.

Respondent does not deny the intercircuit conflict over the monopoly leveraging theory newly revived by the decision below. Nor does it explain how the Second Circuit's standard for monopoly leveraging comports with the text of Section 2 or with *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). It is irrelevant that a general concept of "leveraging" between markets might be used to describe certain conduct that meets *other* antitrust standards, such as tying or monopolization under proper requirements for predatory conduct. It is likewise irrelevant that a regulatory context may help explain incentives and harms from *those* distinct violations.[6] Not surprisingly, neither the Solicitor General nor the non-telephone *amici* here consider the regulatory context to be pertinent to the Second Circuit's leveraging theory. The Second Circuit's standard condemns "using" power in one market "to gain a competitive advantage" in another, and that standard conflicts with other circuits' law, would inhibit pro-consumer vertical integration, and is wrong. "[U]se of monopoly power is not unlawful" (SG Br. 17), and neither is gaining a competitive advantage except by "the use of exclusionary techniques * * * that make economic sense for the monopolist only because they exclude competitors" (SG Br. 18).

[6] The theory that a regulated monopolist could use vertical integration to divert profits from a regulated business into an *unregulated* one (Opp. 16 n.9) has no application here, because the denial of wholesale local services (or access) would simply preserve regulated retail local services, leaving profits capped by regulation at the retail level.

Similarly, respondent wholly disregards how "dramatically" the Second Circuit decision "expands antitrust liability for failure to assist rivals" (SG Br. 8) by discarding limits on the lower courts' "essential facilities" doctrine for purely unilateral assistance duties. That doctrine, however often *recited* by the courts of appeals (Opp. 17-18), has virtually never been the basis for liability and has, in fact, been narrowly confined by multiple conditions that clearly exclude the local-network access duties asserted in this and similar cases. *See* Pet. 12-14, 16-18. Respondent nowhere denies the conflicts created by other circuits' recognition of those limitations; in particular, it ignores the fact—recognized by local-competitor AT&T—that, before the Second Circuit's decision here, the essential facilities doctrine did *not* apply to grant local-network access to would-be competitors in local markets themselves. *See* Pet. 17-18 n.12 (quoting extensive AT&T discussion of limits of essential facilities doctrine). The Second Circuit has created an unprecedented duty of unilateral surrender of monopoly assets to competitors, even mere economic resellers, at court-determined "reasonable" prices.

Respondent offers no support for such a duty and no answer to familiar and fatal objections based on investment incentives and institutional role. Respondent does not deny that this Court has never adopted an "essential facilities" doctrine. Respondent invokes *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), and *Otter Tail*, *supra*, but the Solicitor General gives sufficient reasons that those decisions do not support a nondiscriminatory access obligation, let alone one applicable here. *Terminal Railroad* involved concerted, not unilateral, conduct, and the access duty was part of the remedy, not the liability standard. SG Br. 15 n.4. *Otter Tail* did not rely on "essential facilities" liability, but involved both a refusal to deal found to lack any explanation except maintaining monopoly and other, affirmative misconduct—sham litigation and entry into contracts

restricting potential competitors. SG Br. 13 n.3; *see also* note 3, *supra*; Pet. 16 n.10, 17 n.11, 19 n.13.

Certiorari should be granted on the first question presented, encompassing the Second Circuit's full Section 2 ruling. As the Solicitor General explains, "the conduct underlying respondent's monopoly leveraging claim is identical to the conduct at issue in the essential facilities claim" (SG Br. 17), and that conduct is not predatory (SG Br. 13-14). Unless and until corrected, the Second Circuit's holding that the conduct is nevertheless actionable will harm not only the telecommunications industry but "the entire national economy." SG Br. 20. The only "facts" relevant to correcting that decision, including the nature of respondent's claim and the legal guarantees of the 1996 Act regime, require no further development through costly litigation.

4. The question of standing (under both the Sherman and Communications Acts) should be reviewed along with the antitrust merits. Respondent's discussion (Opp. 20-23) confirms that the Second Circuit's standing rulings are unprecedented and, indeed, contrary to established standing limits recognized by this Court and other circuits. Pet. 23-26. These novel rulings open the courthouse doors to indirect purchasers seeking to bring class actions, deterring efficient dispute resolution between direct parties.

Regarding antitrust standing, respondent has no defense of the Second Circuit's ruling except to repeat that court's misreading of *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Opp. 20-21. The plain fact is that the plaintiff there was injured as a *direct* victim: the defendant refused to pay money to the plaintiff. As *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540 n.44 (1983), confirms, *McCready* involved "direct" injury—and so cannot possibly support standing based on injury, like respondent's, that is indisputably indirect, *i.e.*, derivative of harm to a third party. Respondent had no dealings with Verizon, and the alleged injury here is simply poor service received from AT&T caused by alleged harm to AT&T, Verizon's direct customer. Simply labeling this injury "direct" does not make it so, unless "direct" has no meaning.

Respondent's exclusive reliance on *McCready* shows how wrong and unprecedented the Second Circuit's decision is. Respondent does not mention the longstanding "requirement" of direct injury reiterated in *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992). Nor does respondent mention the indirect-purchaser bar of *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990), and its predecessor, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), or the circuit court decisions rejecting standing for customers' customers. *See* Pet. 25. And respondent cannot square the Second Circuit's abrogation of the traditional direct-injury requirement with the important policies that requirement serves. Concentrating full enforcement power in the directly injured party promotes enforcement, eliminates costly and uncertain causation and apportionment problems, and ensures that direct parties can resolve their disputes efficiently (here, through exclusive nonjudicial mechanisms), without the specter of yet further litigation and exposure to liability at the behest of outsiders impairing such resolutions.[7]

As to Communications Act standing, respondent again disregards the applicable direct-injury requirement, as recognized under statutes similar to 47 U.S.C. §§ 206, 207. Respondent repeats the Second Circuit's confusion of

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[7] *See* Epstein, *Into the Frying Pan: Standing and Privity Under the Telecommunications Act of 1996 and Beyond* (Dec. 2002), to be published in Col. Sci. & Tech. L. Rev., available at http://ssrn.com/abstract_id=362620; Landes & Posner, *Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws?*, 46 U. Chi. L. Rev. 602, 604, 605 (1979) ("allowing indirect purchasers to sue would probably retard rather than advance antitrust enforcement").

"direct" injuries (referring to the causal chain) with "distinct" injuries (referring to the type of harm). Opp. 22. Respondent identifies no precedent in almost 70 years under the 1934 Communications Act allowing suit by the direct customer's customers (though purchase of service for resale, at tariffed rates, has long been practiced under that Act).

Respondent also ignores the second principle violated by the Second Circuit's decision allowing respondent to assert AT&T's legal rights (against discrimination) under the Communications Act: parties generally may assert only their own rights, not those of third parties. Respondent does not even attempt to offer precedent to support such third-party standing under this Act, let alone in the context of a suit by a customer's customer. In such circumstances, governing precedent under the Interstate Commerce Act, the predecessor of the Communications Act, recognized that only the direct victim can sue to vindicate its rights. *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918).

The Second Circuit's radical standing rulings, in sum, have gone essentially undefended. They are fundamentally flawed, are properly resolved at the dismissal stage (as in *Associated General Contractors*), and will, if not corrected, work substantial harm to the interest in efficient law enforcement and dispute resolution—for businesses generally (in the case of the antitrust ruling) and for the telecommunications industry specifically (in the case of the Communications Act ruling). This Court should review the standing rulings along with the Sherman Act ruling of the Second Circuit.

CONCLUSION

For the foregoing reasons, and the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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VERIZON COMMUNICATIONS INC., PETITIONER

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

The United States and the Federal Trade Commission will address the following question presented:

Whether, in reversing the dismissal of a complaint for failure to state a claim upon which relief may be granted under Section 2 of the Sherman Act, 15 U.S.C. 2, the court of appeals erred by relying on a standard of liability that does not require predatory or exclusionary conduct.

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws, and a strong interest in the correct application of those laws in the telecommunications industry.

STATEMENT

1. Section 2 of the Sherman Act, 15 U.S.C. 2, makes it unlawful for any firm to "monopolize, attempt to monopolize, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations." Although Section 2 does not specify the elements of monopolization and attempted monopolization, this Court long ago concluded that Section 2 does not prohibit monopoly status as such. Instead, Section 2 makes it unlawful to acquire or maintain monopoly power through the use of predatory or exclusionary conduct. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).

The antitrust laws most often impose negative duties, requiring firms to *refrain* from anticompetitive conduct. Nonetheless, this Court and others have recognized some circumstances in which the Sherman Act imposes an *affirmative* duty to assist rivals. For example, relying on decisions such as *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383, 411 (1912), and *Aspen Skiing*, *supra*, the lower federal courts have recognized an "essential facility doctrine," under which "a vertically integrated monopolist" may sometimes be required "to share some input in a vertically related market * * * with someone operating in an upstream or downstream market." See 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 771a, at 169-170 (2d ed. 2002).

This case concerns the scope of such affirmative antitrust obligations and presents the issue in the important context

of the telecommunications industry. The current structure of the telecommunications industry is in part a product of the 1982 consent decree that settled the United States' antitrust suit against AT&T. *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). That decree, among other things, separated AT&T's long-distance and equipment-manufacturing units, which were subject to competition, from the units that provided monopoly local telephone service, and barred the local telephone companies from providing long-distance telephone service except in limited circumstances. See *Verizon Communications, Inc.* v. *FCC*, 122 S. Ct. 1646, 1655 (2002). Neither the decree nor FCC regulation substantially increased competition in local telephone service, which continued to be dominated by incumbent local exchange carriers (ILECs), such as the Bell Companies that inherited AT&T's local telephone franchises. *Ibid.*

Congress enacted the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. 251 *et seq.*), in part to bring competition to the local exchange market. The 1996 Act "required incumbent local-exchange carriers to share their own facilities and services on terms to be agreed upon with new entrants," and empowered the FCC to "prescribe methods for state commissions to use in setting rates that would subject both incumbents and entrants to the risks and incentives that a competitive market would produce." *Verizon* v. *FCC*, 122 S. Ct. at 1654 (citing 47 U.S.C. 251(c)). Competitors may purchase an incumbent's local telephone service at a wholesale rate and resell it, 47 U.S.C. 252(c)(4); they may build their own facilities and "interconnect" them with the incumbent's network, 47 U.S.C. 251(c)(2); or they "may choose to lease" components of the incumbent's network—known as "network elements"—"which the incumbent has a duty to provide 'on an unbundled basis' at terms that are 'just, reasonable, and

nondiscriminatory,'" 47 U.S.C. 252(c)(3). See 122 S. Ct. at 1662; *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress was concerned that, absent such requirements, a "newcomer could not compete with the incumbent carrier without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the 'last mile' of feederwire, the local loop, to the thousands or millions of terminal points in individual homes and businesses." 122 S. Ct. at 1662.

The 1996 Act provides that new carriers and incumbents must negotiate, in good faith, critical terms for resale of services, interconnection, and leasing of network elements. *Verizon* v. *FCC*, 122 S. Ct. at 1662-1663 (citing 47 U.S.C. 251(c)(1), 252(a)(2)). If the carriers fail to agree, either carrier may seek mediation by the public utilities commission of the relevant State. *Ibid.* (47 U.S.C. 252(a)(2)). State commissions may impose rates consistent with two basic pricing standards established by the Act. First, when the new entrant purchases the incumbent's services under the Act's "resale" provisions, it pays a "wholesale" price based on the incumbent's retail rates, less costs "attributable to any marketing, billing, collection, and other costs that will be avoided by the [incumbent] local exchange carrier." 47 U.S.C. 252(d)(3). Second, when the new entrant purchases interconnection or unbundled network elements, the pricing rules established by the FCC pursuant to 47 U.S.C. 252(d)(1) and upheld by this Court in *Verizon* v. *FCC*, *supra*, apply. Under those rules, the rates for unbundled network elements are based on "total element long-run incremental cost" (TELRIC), which (roughly speaking) represents the cost the incumbent *would incur* to provide the service "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration," given the existing location of the incumbent's wire centers. 122 S. Ct. at 1664-1665. The incumbent is

required to offer the TELRIC rates even if its historical costs are higher or it would earn more by selling to the end-user customers directly on its own. Because the FCC's rules allow new entrants to purchase the entire bundle of network elements that make up local telephone services at TELRIC rates based on forward-looking costs, new entrants may choose those rates rather than the "wholesale" (avoided cost) rate for resale of the incumbent's telephone services if the TELRIC rates are lower.

The 1996 Act also includes an antitrust savings clause. § 601(b), 110 Stat. 143. The savings clause states that, "except as provided" in two other provisions, "nothing in this Act * * * shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. 152 note.

2. This case arises out of a dispute between AT&T, which is a competitive local exchange carrier (CLEC), and petitioner Verizon Communications Inc., an incumbent local exchange carrier (ILEC). The dispute involves petitioner's performance of an interconnection agreement executed for the State of New York following negotiation and binding arbitration pursuant to 47 U.S.C. 251 and 252. See Pet. App. 5a, 22a; Order Approving Interconnection Agreement, Case No. 06-C-0723 (N.Y. Pub. Serv. Comm'n June 13, 1997), *available in* 1997 WL 410707. The agreement specifies the terms and conditions under which petitioner is to provide AT&T with the use of petitioner's local telephone network so that AT&T can sell local telephone service in competition with petitioner. The agreement also specifies dispute-resolution procedures that are "the exclusive remedy for all disputes between" petitioner and AT&T "arising out of th[e] [a]greement or its breach." *Ibid.* The dispute between AT&T and petitioner was resolved nearly three years ago by an FCC consent decree under which petitioner agreed,

among other things, to pay $3 million to the United States and $10 million to AT&T and other CLECs. *Ibid.*

One day after the FCC issued the consent decree, respondent filed this lawsuit as a putative class action. Pet. App. 51a. Respondent is an AT&T customer, *id.* at 5a, but has no apparent business relationship with petitioner. In the complaint, respondent alleged:

> [Petitioner] has not afforded CLECs access to the local loop on a par with its own access. Among other things, [petitioner] has filled orders of CLEC customers after fulfilling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with [petitioner].

Id. at 6a (quoting Am. Compl. ¶ 21); see Am. Compl. ¶ 54.

Respondent did not allege that petitioner had failed to fill, or had delayed filling, any order relating to its own AT&T local telephone service. Respondent instead alleged that petitioner's conduct had affected its "ability * * * to obtain satisfactory Local Phone Service," and injured petitioner's competitors "in the provision of local phone service." Am. Compl. ¶ 57. Respondent further alleged that petitioner's conduct "had no valid business reason and was intended to exclude competition * * * by making it difficult for competitors to provide service in the Local Phone Service market on the level that [petitioner] is able to provide to its customers in that market." Pet. App. 6a-7a. Respondent asserted, among other things, a treble damages claim under Section 2 of the Sherman Act and several claims under federal telecommunications law. Pet. App. 6a.

The district court dismissed the complaint. Pet. App. 49a-61a. The court held that respondent lacked standing to bring

a claim under the Communications Act of 1934, § 202, 47 U.S.C. 202, since the claim attempted to assert the rights of petitioner's competitors rather than respondent's own rights. Pet. App. 60a-61a. With respect to the Sherman Act claims, the court held that respondent had standing. *Id.* at 53a-54a. In the court's view, respondent had alleged a direct injury resulting from the poor service allegedly caused by petitioner's conduct. That injury, the court held, was "wholly distinct" from any injury inflicted on CLECs such as AT&T. *Id.* at 54a.

The court then held that respondent had failed to state a claim of monopolization in violation of the Sherman Act, because the complaint failed to allege willful acquisition or maintenance of monopoly power. Pet. App. 54a. The court explained that the only anticompetitive conduct identified by the complaint was petitioner's "failure to cooperate with local competitors as required by 47 U.S.C. 251." *Ibid.* "The affirmative duties imposed by the Telecommunications Act," the court observed, "are not coterminous with the duty of a monopolist to refrain from exclusionary practices." *Ibid.* (citing *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000)).

Respondent amended the complaint, adding allegations that a CLEC "acts as the agent for its customers" in dealing with petitioner and that petitioner breached its contracts with the CLECs "with the purpose of acquiring or maintaining monopoly power in the local phone service market." Pet. App. 63a. The district court again dismissed the complaint. *Id.* at 64a-68a. The court noted that, under respondent's Sherman Act theory, "'when a firm with enough market power breache[s] the terms of contracts it has with competitors that assist those competitors * * * and it does so with the intent to hinder the ability of those competitors to compete in that market, it violates Section 2 of the Sherman Act,' Pl.'s Mem. at 6." *Id.* at 66a. The antitrust laws, the

court observed, do not put monopolists under a general duty to cooperate with competitors, *ibid.* (citing *Aspen Skiing*, 472 U.S. at 600), or to continue assistance to a competitor once begun, *ibid.* (citing *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986)). Thus, the court held that the alleged breaches of contract "were not 'anticompetitive' conduct within the meaning of the antitrust laws." *Id.* at 67a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-48a. It held that respondent's complaint is sufficient to "support an antitrust claim" under two different theories. *Id.* at 29a. First, the court stated that the complaint "may state a claim under the 'essential facilities' doctrine," under which "a monopolist has a duty to provide competitors with reasonable access to * * * facilities under the monopolist's control and without which one cannot effectively compete in a given market." *Ibid.* Second, the court concluded that respondent "may have a monopoly leveraging claim," which could be established by showing that "the defendant '(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market; and (3) caused injury by such anticompetitive conduct.'" *Id.* at 30a (quoting *Virgin Atl. Airways* v. *British Airways*, 257 F.3d 256, 272 (2d Cir. 2001)).

The Second Circuit declined to follow the Seventh Circuit's decision in *Goldwasser*, upon which the district court had relied. Pet. App. 31a-39a. The Second Circuit concluded that, although the antitrust claims may be "inextricably linked" to conduct that allegedly violates the 1996 Act, there is no incompatibility between that regulatory scheme and the federal antitrust laws. *Ibid.*[1]

[1] The Second Circuit agreed that respondent has standing to bring an antitrust action. Pet. App. 26a-28a. The Second Circuit also agreed that respondent lacks standing to bring suit for alleged violations of the

DISCUSSION

The Second Circuit's decision in this case dramatically expands antitrust liability for failure to assist rivals. It conflicts with the decisions of other courts of appeals, including *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), which held that "similar allegations of monopolistic conduct" did not state a claim upon which relief may be granted. Pet. App. 31a. The Second Circuit's decision is erroneous. And it will have significant practical consequences, particularly for the telecommunications industry as it adapts to the fundamental regulatory changes wrought by the Telecommunications Act of 1996.

The 1996 Act requires incumbent telecommunications carriers to assist their rivals by providing them with access to their networks under legislatively and administratively developed conditions and formulae. *Verizon Communications, Inc.* v. *FCC*, 122 S. Ct. 1646, 1654 (2002). This Court has recognized the importance of that complex legislation and the industry it restructures by granting review in two cases raising statutory interpretation issues. See *Verizon* v. *FCC*, *supra*; *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case raises similarly important issues. In the courts of appeals, the United States and the FCC have filed briefs as *amici curiae* urging, among other things, the rejection of any construction of the 1996 Act that would render it an implied repeal of the antitrust laws in this important sector of the economy. Well-established principles preclude recognition of such immunity absent clear repugnancy between the antitrust laws and a regulatory statute, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218 (1966); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372-375 (1973), and any implied repeal would contravene the 1996 Act's declaration that it should not "be construed to modify, impair, or supersede the applicability of any of the antitrust laws." See 47 U.S.C. 152 note. The Second Circuit in this case, like the Seventh Circuit in *Goldwasser*, correctly concluded that the 1996 Act does not immunize petitioner's conduct from scrutiny under the antitrust laws. See Pet. App. 32a; *Goldwasser*, 222 F.3d at 401 (declining to hold "that the 1996 Act confers implied immunity").

Nonetheless, the 1996 Act's imposition of new duties to assist rivals—coupled with the increasing number of antitrust lawsuits predicated on alleged noncompliance with the 1996 Act—have given new urgency to careful examination of the circumstances under which *antitrust law* requires a dominant firm to provide such assistance. The Second Circuit's decision unduly expands those circumstances by endorsing essential facilities and monopoly leveraging theories that are uncabined by any requirement that the challenged conduct be exclusionary or predatory—*i.e.*, that the refusal not make economic sense *except* as an effort to diminish competition. That approach improperly trivializes the antitrust laws and encourages litigants to seek antitrust remedies for ordinary commercial and regulatory disputes. The decision and the many lawsuits based on the theories it endorses, moreover, could threaten substantial disruption of the telecommunications industry. Accordingly, the petition for a writ of certiorari should be granted.

1. Section 2 of the Sherman Act specifies two offenses that can be carried out by a firm acting unilaterally—monopolization and attempted monopolization. See *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993) (noting that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously

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interconnection agreements under 47 U.S.C. 251. Pet. App. 19a, 23a-25a. Finally, the Second Circuit held that respondent has standing under Section 202 of the Communications Act of 1934, 47 U.S.C. 202, which prohibits unreasonable discrimination. Pet. App. 12a-16a. Petitioner has asked this Court to review the Second Circuit's holdings on antitrust and Section 202 standing. Pet. 23-26.

threatens to do so") (citing *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984)). This Court long ago made clear that Section 2 does not prohibit monopoly as such, *i.e.*, "monopoly in the concrete." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911). Rather, the offense of monopolization is broadly defined as (1) the willful acquisition or maintenance of monopoly power (2) by the use of anticompetitive conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992) (quoting *United States* v. *Griffith*, 334 U.S. 100, 107 (1948)); see *United States* v. *Alcoa*, 148 F.2d 416, 432 (2d Cir. 1945).

A *sine qua non* for any monopolization or attempted monopolization claim is anticompetitive conduct that "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 651f, at 83-84 (2d ed. 2002). Further, to be "anticompetitive," the conduct must be "exclusionary" or "predatory." *Aspen Skiing*, 472 U.S. at 602. That is, the conduct must "not only (1) tend[] to impair the opportunities of rivals, but also (2) either * * * not further competition on the merits or do[] so in an unnecessarily restrictive way." *Id.* at 605 n.32. Conduct is "exclusionary" or "predatory" in antitrust jurisprudence if the conduct would not make economic sense for the defendant but for its elimination or softening of competition. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588-589 (1986). For example, exclusionary conduct normally involves the sacrifice of short-term profits or goodwill in order to maintain or obtain long-term monopoly power. *Aspen Skiing*, 472 U.S. at 608, 610-611; see also *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 803

(8th Cir. 1987); *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 523-524 & n.3 (5th Cir. 1999).[2]

a. Consistent with those standards, the antitrust laws generally afford all firms—including monopolists—considerable discretion in determining with whom they will and will not deal, *Aspen Skiing*, 472 U.S. at 600-603, and permit firms to demand whatever rates they can obtain in the marketplace, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979); *Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute").

A monopolist's right to refuse cooperation with rivals, however, is not wholly unqualified. *Aspen Skiing*, 472 U.S. at 600-601. If such a refusal involves a sacrifice of profits or business advantage and makes economic sense only because it softens or injures competition, it is "exclusionary" and

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[2] Such exclusionary conduct need not always entail substantial economic sacrifice. For example, the enforcement of a fraudulently-obtained patent may involve limited expenditures, but may well amount to exclusionary conduct under Section 2, if it also has the requisite effect on competition. See *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-178 (1966). Likewise, sham litigation or bad-faith administrative filings may impose little cost on a monopolist, but create substantial anticompetitive impact in violation of Section 2. See, *e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Cf. 3 Areeda & Hovenkamp, *supra*, ¶¶ 651a, 658f, at 72, 131-132, 135 (The application of Section 2 does not entail an open-ended "'balancing' of social gains against competitive harms," and "a firm is under no obligation to sacrifice its own profits," but unlawful exclusionary acts are those that "do not benefit consumers * * * or * * * produce harms disproportionate to the resulting benefits."). In *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58-59, cert. denied, 534 U.S. 952 (2001), the en banc District of Columbia Circuit suggested, as one step of its analysis under Section 2, a "balancing approach" analogous to the "rule of reason" standard applied under Section 1 of the Sherman Act. The United States did not suggest or endorse such a "balancing approach" in the *Microsoft* case.

potentially unlawful. In *Aspen Skiing*, for example, this Court upheld a verdict against the Ski Co. where the Ski Co. had terminated its former cooperation with a smaller rival. The Ski Co.'s decision to refuse cooperation had required the sacrifice of immediate profits—the Ski Co. refused to sell its lift tickets to its rival at full price, "forgo[ing] daily ticket sales" and the goodwill of its own customers, who were inconvenienced by that choice. 472 U.S. at 608. The Ski Co. had "elected to forgo these short term benefits," the evidence showed, "because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Ibid.*; see *id.* at 610-611.

b. Relying on an "essential facilities doctrine," the lower federal courts have identified limited circumstances in which a monopolist in one market may have a duty to deal with its competitors in a related market. Under that doctrine, as set forth in the leading case, a monopolist may be required to assist rivals by sharing a facility if the monopolist can "extend monopoly power from one stage of production to another" and the following four elements are found:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI v. AT&T, 708 F.2d 1081, 1132-1133 (7th Cir. 1983).

This Court "has never adopted" the essential facilities doctrine as a basis for liability in a Section 2 case. *Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part). And the doctrine has been heavily criticized. See, *e.g.*, 3A Areeda & Hovenkamp, *supra*, ¶ 771c, at 173 ("the 'essential facility' doctrine is both harmful and unnecessary and should be abandoned"). At a minimum, the doctrine must be applied only in a manner consistent with Section 2 itself, which "prohibits only acts that constitute

'monopolization' or 'attempts to monopolize.'" 3 Areeda & Hovenkamp, *supra*, ¶ 652, at 89-90. Consequently, like other monopolization and attempted monopolization claims, essential facilities claims must at a minimum include some showing of "exclusionary" or "predatory" conduct, *i.e.*, that the refusal to share the facility would not make economic sense unless it tended to reduce or eliminate competition.[3]

2. Rather than require a showing of exclusionary or predatory conduct in this case, the court of appeals applied the essential facilities doctrine as a stand-alone form of liability. The gravamen of respondent's claim is that, by failing to fill its competitors' orders in a timely fashion, petitioner failed to provide its competitors with full and nondiscriminatory use of its local telephone network to permit them to resell petitioner's service in competition with petitioner. See Am. Compl. ¶¶ 21, 54; p. 5, *supra*. Respondent's complaint does not implicate an *antitrust* duty to provide such access, because the complaint does not allege that any refusal to deal was predatory or exclusionary, *i.e.*, that the refusal would not make business sense *unless* it tended to limit or soften competition. Contrast *Aspen Skiing*, 472 U.S. at 608, 610-611 (evidence showed that defendant "elected to forgo * * * short term benefits because it was more interested in reducing competition * * * over the long run").

The complaint does allege that petitioner "had no valid business reason" for its allegedly unlawful conduct. Pet. App. 6a (quoting Am. Compl. ¶ 57). But that conclusory

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[3] *Otter Tail*, *supra*, is not to the contrary. *Otter Tail* was not based on an "essential facilities" theory of liability, and the trial court found that the *sole* reason for the conduct there was to prevent erosion of monopoly power. See 410 U.S. at 378. The defendant, moreover, not only refused to deal, but also engaged in sham litigation, *id.* at 379, and demanded and enforced anticompetitive provisions in contracts with potential competitors, *id.* at 378-379.

assertion is not a sufficient allegation that the conduct would not make economic sense apart from an effort to restrain competition. See *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986) (court not "bound to accept as true a legal conclusion couched as a factual allegation"). Nor did the court of appeals so understand the allegation, since it did not mention that allegation as part of its antitrust analysis. And the allegation is inherently implausible when measured against the regulatory scheme the complaint itself mentions. See *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F.3d 53, 56-57 (1st Cir. 1999) (plaintiff cannot rely on conclusory allegation that is inherently implausible absent concrete factual assertions to support it). Under the 1996 Act and FCC rules, the prices petitioner must charge its competitors appear to be considerably below any it otherwise might set. See pp. 3-4, *supra*. The antitrust laws do not require monopolists to sacrifice profits to sell to competitors at a discount. "[N]o firm has a general duty to injure itself in order to benefit a rival." 3A Areeda & Hovenkamp, *supra*, ¶ 773, at 211; see also *id.* ¶ 772, at 188 (*Aspen Skiing* "certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than a monopolistic price."). Yet the Second Circuit recognized such a duty here. The court of appeals' decision thus creates the risk of Section 2 liability based merely on the needs of the rival, the violation of regulatory requirements, or perhaps even simple breach of contract. It imposes "precisely the kinds of affirmative duties to help one's competition that * * * do not exist under the unadorned antitrust laws." *Goldwasser*, 222 F.3d at 400.

The 1996 Act, as implemented by the FCC regulations upheld by this Court in *Verizon* v. *FCC*, *supra*, *does* require incumbent local telephone companies to lease their services and facilities to competitors. To stimulate competition in local exchange markets, the Act and the FCC's rules require

those carriers to sell "at rates that would attract new entrants when it would be more efficient" for them to lease the incumbent's facilities than to build their own. 122 S. Ct. at 1687. The Act also establishes nondiscrimination rules, requiring incumbents to provide access that is "at least equal in quality to that provided by the local exchange carrier to itself." Pet. App. 5a (quoting 47 U.S.C. 251(c)(2)(C)). As the Seventh Circuit recognized in *Goldwasser*, however, "the duties the 1996 Act imposes" are not "coterminous with the duty of a monopolist to refrain from exclusionary practices." 222 F.3d at 399; see also 47 U.S.C. 152 note (Act does not "modify * * * the applicability of any of the antitrust laws."). Unlike the 1996 Act, the Sherman Act does not impose a duty to sell to rivals in an evenhanded fashion unless the refusal is predatory or exclusionary, *i.e.*, unless the refusal represents a *sacrifice* of profit or goodwill that makes sense only because it has the effect of injuring competition.[4]

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[4] The court of appeals interpreted the essential facilities doctrine to require that access be provided on "just and reasonable terms" placing all on an "equal plane." Pet. App. 29a. That language, however, is not drawn from standards relating to antitrust *liability* but from the *remedial* requirements this Court addressed in *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383, 411 (1912). See *Southern Pac. Communications Corp.* v. *AT&T*, 740 F.2d 980, 1008-1009 (D.C. Cir. 1984); *United States* v. *AT&T*, 524 F. Supp. 1336, 1352-1353 (D.D.C. 1981). *Terminal Railroad*, moreover, was not based on an essential facilities theory of liability. Instead, that case concerned whether "unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade." 224 U.S. at 394. Nor was a denial of use at issue there, since the fact "[t]hat other companies are permitted to use the facilities of the Terminal Company upon paying the same charges paid by the proprietary companies seem[ed] to be conceded." *Id.* at 400. The Court chose to impose a requirement of equal access on reasonable terms as part of a remedial scheme because it found that dissolving the combination would be injurious to the public. *Id.* at 409-411; *Associated Press* v. *United States*, 326 U.S. 1, 25 (1945) (Douglas,

3. The court of appeals' formulation of its second theory of Section 2 liability—monopoly leveraging—similarly countenances an antitrust violation unsupported by the Sherman Act's text and fundamental antitrust principles. The theory of monopoly leveraging is designed to prevent a firm with a monopoly in one market from using its power in that market to extend its monopoly into a second market. In this case, the court of appeals held that a "monopoly leveraging" violation is established if a monopolist in one market uses its monopoly to "gain a competitive advantage" in a second market—thereby causing injury—Pet. App. 30a, *even if* the monopolist does not have "a dangerous probability" of successfully acquiring or maintaining a monopoly in the second market, *id.* at 31a n.13. That formulation is difficult to reconcile with the text of the Sherman Act, which proscribes monopolization and attempted monopolization, not "the 'abuse' of one's dominant position." 3 Areeda & Hovenkamp, *supra*, ¶ 652, at 89. It is also inconsistent with this Court's decision in *Spectrum Sports*, 506 U.S. at 459, which clarifies that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[5] Finally, although followed by one circuit, *Kerasotes Mich. Theatres, Inc.* v. *National Amusements, Inc.*, 854 F.2d 135, 136-138 (6th Cir. 1988), cert. dismissed, 490 U.S. 1087 (1989), the Second Circuit's "competitive advantage" formulation has been rejected by two others, *Fineman* v. *Armstrong World Indus., Inc.*, 980 F.2d

J., concurring) (*Terminal Railroad* "held that as an alternative to dissolution a plan should be submitted which provided for equality of treatment of all railroads.").

[5] The Second Circuit has elsewhere acknowledged that tension. See *Virgin Atl. Airways* v. *British Airways*, 257 F.3d 256, 272 (2d Cir. 2001) (*Spectrum Sports* creates "uncertainty * * * as to the continued scope of a monopoly leveraging claim as an independent cause of action.").

171, 206 (3d Cir. 1992); *Alaska Airlines, Inc.* v. *United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991).[6]

Moreover, the Second Circuit's "monopoly leveraging" formulation suffers from the same defect as its "essential facilities" holding—it does not require the monopolist's conduct to be "exclusionary" or "predatory" within the meaning of Section 2 jurisprudence. The court of appeals identified only one conduct element to the violation alleged here, which was the alleged "use" of monopoly power in one market. Pet. App. 31a.[7] But use of monopoly power is not unlawful; predatory or exclusionary conduct to create or maintain a monopoly is. Indeed, the conduct underlying respondent's monopoly leveraging claim is identical to the conduct at issue in the essential facilities claim—petitioner's alleged breach of contractual and regulatory requirements that it provide CLECs with access to its facilities at specified rates and terms. For the reasons given above, the complaint's allegations are insufficient to render that conduct exclusionary or

[6] Notwithstanding the clear circuit conflict on this issue, there is reason to doubt whether this case squarely presents it. The complaint's allegations regarding petitioner's market share in the "second" market (retail local telephone service), see Am. Compl. ¶ 50, may sufficiently plead monopolization or a dangerous probability of success. The court of appeals' refusal to require such allegations, however, further manifests its basic error of treating refusal to provide equal access to an "essential facility" and "monopoly leveraging" as antitrust torts, rather than antitrust *theories* that must be applied consistently with the offenses of "monopolization" and "attempted monopolization" created by the Sherman Act. The court of appeals' decision thus provides erroneous guidance for the further proceedings it has required in this case.

[7] The court of appeals made clear that it considered the use of monopoly power in a monopoly leveraging claim to be "predatory or anticompetitive conduct" per se. Pet. App. 31a n.13. Ignoring the substance attached to those labels, however, the court never explained why petitioner's—or any other monopolist's—use of monopoly power to gain a competitive advantage in a second market would *always* be economically irrational unless it tended to soften or eliminate competition.

predatory, *i.e.*, economically inexplicable absent a tendency to reduce competition.

The Second Circuit appears to have derived its monopoly leveraging formulation from *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), which declared it "unlawful" to use "monopoly power, however lawfully acquired, * * * to gain a competitive advantage," by way of *Berkey Photo*, 603 F.2d at 275, which stated that "a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another." But the court of appeals took that language out of context. *Griffith* concerned the alleged use of monopoly power to extract "exclusive privileges" that "unreasonably restrained competition"; it was the extraction of privileges that was found problematic. 334 U.S. at 103-104. *Berkey Photo*, building on *Griffith*, nowhere suggests that a monopolist in one market may not lawfully benefit from that monopoly when competing in a second market. 603 F.2d at 276 (noting that "an integrated business" does not "offend the Sherman Act whenever one of its departments benefits from an association with a division possessing a monopoly in its own market"). What offends the Sherman Act is the use of exclusionary techniques, see *id.* at 274 ("predatory pricing, lease-only policies, and exclusive buying arrangements, to list a few"), that make economic sense for the monopolist only because they exclude competitors. The court of appeals' monopoly leveraging formulation in this case lacks that critical qualification. As a result, like the court's essential facilities analysis, it risks converting standards used in remedial and regulatory regimes (equal access at regulated rates) into free-standing bases for Section 2 liability.

4. Accordingly, there are strong reasons for reviewing the Second Circuit's decision, notwithstanding the procedural posture of this case. Because the issues arise on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), further review would have to take into account the

forgiving pleading standards established by Rule 8, see *Swierkiewicz* v. *Sorema*, 534 U.S. 506 (2002), the limited record, and possible disputes about what materials may be considered or how to construe the complaint. While those concerns may raise doubt about whether this Court's review would necessarily result in a final disposition of the case, they pose no impediment to proper articulation by this Court of the antitrust standard of liability to be applied in any further proceedings in this or other similar cases. In our view, such clarification of the governing legal standards under Section 2 of the Sherman Act is now needed.

More than a decade ago, the Solicitor General urged the Court to review another Second Circuit "essential facilities" case, *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (1990). See U.S. Br., *Consolidated Rail Corp.* v. *Delaware & Hudson Ry.*, 500 U.S. 928 (1991) (No. 90-380). In that case too, the Second Circuit appeared to countenance antitrust liability based on the adverse effect of a refusal to deal with a competitor, even where that refusal tended to maximize the defendant's profits apart from any effect on competition. See 902 F.2d at 178. There too, the Second Circuit construed the Sherman Act to impose a duty to cooperate with rivals on "reasonable" terms. *Id.* at 180. Although this Court declined review (perhaps because of procedural concerns and a lack of clarity in the Second Circuit's decision, see U.S. Br. at 19, *Consolidated Rail*, *supra*), the decision in this case confirms that the Second Circuit has expanded Sherman Act Section 2 liability beyond its proper bounds.

This decision does so, moreover, in the context of the rapidly evolving telecommunications industry, at a time when the unfolding implementation of the 1996 Act is generating an abundance of antitrust litigation involving similar claims. Two other courts of appeals have already wrestled with the interplay of the Sherman Act and the 1996 Act, *Covad Communications Co.* v. *BellSouth Corp.*, 299

F.3d 1272 (11th Cir. 2002); *Goldwasser, supra.* More appeals are pending, *Covad Communications Co.* v. *Bell Atl. Corp.*, No. 02-7057 (D.C. Cir. filed May 10, 2002); *Cavalier Tele., LLC* v. *Verizon Va., Inc.*, No. 02-1337 (4th Cir. filed Apr. 2, 2002). Still more claims are being filed in the district courts. See Pet. 28 n.22. Moreover, while the impact on the telecommunications industry in the wake of the 1996 Act by itself makes resolution of this case a matter of substantial importance, further guidance from this Court would resolve issues that affect the entire national economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, L.L.P.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF BELLSOUTH CORPORATION, SBC COMMUNICATIONS INC., AND UNITED STATES TELECOM ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether allegations that an incumbent telecommunications carrier did not sufficiently assist competing carriers state a claim under the antitrust laws.

2. Whether customers of competing carriers have standing under the antitrust laws to raise such a claim.

3. Whether Congress intended that such allegations be resolved through the remedial framework of the Telecommunication Act of 1996 rather than antitrust litigation.

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INTEREST OF THE AMICI CURIAE

Amici BellSouth Corporation and SBC Communications Inc. are incumbent local exchange carriers ("ILECs") in their respective regions. Amicus United States Telecom Association is the leading trade association for the local telephone industry. Founded more than a century ago, USTA represents some 670 facilities-based incumbent wireline providers of local telephone service, which operate more than 80% of the country's local access lines.

BellSouth and SBC have entered into thousands of agreements with competing local exchange carriers ("CLECs") pursuant to the Telecommunications Act of 1996 ("1996 Act"). Because the parties to these agreements are competitors, disputes frequently arise between them. Most of these disputes are resolved informally or, where necessary, before the state commissions that oversee inter-carrier relations. The decision below, holding that a CLEC's customer has standing to raise and has properly alleged a monopolization claim by asserting that the incumbent carrier did not sufficiently assist competitors, dramatically expands the scope of the antitrust laws. This Court's intervention is needed to uphold proper limits on antitrust law and standing and to give effect to the administrative framework prescribed by Congress in the 1996 Act.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below reflects a sharp inter-circuit split over the scope of federal antitrust law and its applicability

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[1] This brief was not written in whole or in part by any party and no one other than the amici made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the clerk.

to recurring, complex, and highly technical disputes arising within the framework of the 1996 Act. By overriding established limits on antitrust liability and authorizing any telephone customer to bypass Congressionally designated regulators and initiate a treble-damages antitrust suit, the Second Circuit has unleashed a new wave of burdensome antitrust litigation on the federal courts. Its expansion of the previously narrow "essential facilities" and "monopoly leveraging" doctrines has adverse implications both for the telecommunications industry and for all sectors of the American economy.

In the 1996 Act, Congress ended 12 years of unhappy experience with judicial oversight of the telephone industry under the AT&T divestiture decree. It did so by creating an unprecedented regulatory regime that calls on regulated entities to provide extensive affirmative assistance to competing firms. Under the Act, ILECs are required to assist competitors both in entering the local telephone business and in taking away the ILECs' own customers. In particular, the Act requires ILECs to "share their own facilities" with competitors at cost and to provide wholesale services at deep discounts. *Verizon Communications Inc.* v. *FCC*, 122 S. Ct. 1646, 1654 (2002). This was a fundamental departure from existing antitrust law.

To implement these new duties, the 1996 Act created an elaborate system of compulsory negotiation and arbitration, with enforcement by state and federal administrators. In direct conflict with *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the court below held that alleged violations of these new duties—even if already remedied pursuant to the administrative scheme of the 1996 Act—may give rise to class action consumer lawsuits under the antitrust laws. Pet. App. 1a-39a. The Eleventh Circuit has also permitted a CLEC's

antitrust claim to go forward in a similar context. *Covad Communications Co.* v. *BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002). Conflicts over these issues have produced discrepant results at the district court level as well.[2]

The class action bar's response to the decision below has been swift and dramatic. "[A] plaintiffs' bar that has already looted the tobacco and asbestos industries is now salivating at the prospect of feeding off the Bells." Wall St. J., Aug. 23, 2002, at A12. At least 20 class action lawsuits already have been filed in district courts in the Second Circuit—11 against Verizon and 9 against SBC. District courts in New York also have relied on the decision below to mandate burdensome new sharing obligations in antitrust cases involving the cable and software industries.

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[2] Compare *Covad Communications Co.* v. *Bell Atl. Corp.*, 201 F. Supp. 2d 123, 130 (D.D.C. 2002) (agreeing with *Goldwasser* that ILEC's alleged failure to affirmatively assist competitors was "outside the parameters of pre-existing antitrust law"); *Cavalier Tel., LLC* v. *Verizon Va., Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002) (same); *Verizon N.J., Inc.* v. *Ntegrity Telecontent Servs., Inc.*, 219 F. Supp. 2d 616 (D.N.J. 2002) (same); *MGC Communications, Inc.* v. *BellSouth Telecommunications, Inc.*, 146 F. Supp. 2d 1344 (S.D. Fla. 2001) (same); *Supra Telecommunications & Info. Sys., Inc.* v. *BellSouth*, No. 99-1706 (S.D. Fla. June 8, 2001) (same); *Intermedia Communications, Inc.* v. *BellSouth Telecommunications, Inc.*, 173 F. Supp. 2d 1282 (M.D. Fla. 2000) (same); *Building Communications, Inc.* v. *Ameritech Servs., Inc.*, No. 97-CV-76336 (E.D. Mich. June 21, 2001) (same), with *Ohio Bell Tel. Co.* v. *CoreComm Newco, Inc.*, 214 F. Supp. 2d 810 (N.D. Ohio 2002) (disagreeing with *Goldwasser* and holding that an ILEC's alleged failure to affirmatively assist competitors may support an antitrust claim); *Davis* v. *Pacific Bell*, 204 F. Supp. 2d 1236 (N.D. Cal. 2002) (same); *Stein* v. *Pacific Bell*, 173 F. Supp. 2d 975 (N.D. Cal. 2001) (same); *Metronet Servs. Corp.* v. *Qwest Corp.*, 2001 WL 765167 (W.D. Wash. Apr. 16, 2001) (same).

See Pet. 29. The Eleventh Circuit's *Covad* decision has spawned 8 more class action suits against BellSouth. Discovery and trial in cases that withstand dismissal motions will cost defendant carriers tens of millions of dollars and impose enormous burdens on the courts. The judgments in such cases inevitably will be inconsistent with or duplicative of the determinations made by federal and state regulators, in whom Congress vested authority.

The Seventh Circuit held in *Goldwasser* that the antitrust laws may not be invoked to generate a supplementary, common-law body of network sharing obligations and affirmative assistance to rivals. That court explained that antitrust law has *never* required such assistance, that expansion of the law to embrace these duties would improperly overlap and conflict with the new regulatory scheme, and hence that antitrust claims invoking such duties must be dismissed.

By sustaining a consumer class action complaint of the very kind dismissed in *Goldwasser*, the Second Circuit has radically extended the scope of federal antitrust litigation and conferred standing on millions of individual consumers to raise these newly-minted claims. It broadly sanctioned monopolization suits under the previously narrow "essential facilities" doctrine, inviting juries to require affirmative assistance of a kind that has been the exclusive province of regulatory law. It also rejected the position of other circuits by reviving a discredited version of the monopoly leveraging doctrine, one that forbids firms with lawfully obtained dominance in a wholesale market from using that position to obtain a "competitive advantage" in a retail market. Such open-ended criteria would enable antitrust juries to cast aside the standards and requirements of the 1996 Act and fashion their own telecommunications policies under the Sherman Act's generalized "rule of reason."

Nothing in the 1996 Act suggests that Congress ever intended to have the Act's novel and far-reaching duties serve as a baseline from which antitrust juries may add even more regulatory obligations and enforce them by treble-damage awards. To the contrary, Congress flatly prohibited such expansion of antitrust. The Act expressly provided that its newly articulated administrative standards would not "modify" or otherwise extend the federal antitrust laws, and it removed the AT&T divestiture litigation from the federal district courts and entrusted inter-carrier disputes to the FCC and state regulators in deference to their administrative expertise. See 110 Stat. 56, 143, § 601(a), (b), reprinted as notes to 47 U.S.C. § 152. The 1996 Act thereby replaced the 12 years of "government by consent decree" that followed the AT&T divestiture, under which Judge Harold Greene was required to resolve complex and recurring disputes between telephone carriers. H.R. Conf. Rep. No. 104-458, at 198-201 (1996). The Second Circuit's disregard of these statutory mandates permits multiple antitrust juries to supersede the new administrative scheme.

Congress intended disputes among rival carriers to be resolved through good faith negotiation and arbitration under state commission supervision and legal standards specified by Congress, the FCC, and the state PSCs. Within this comprehensive framework, carriers have negotiated thousands of interconnection and resale agreements specifying their rights and obligations, many of which require resolution of disputes through ADR proceedings and specify sanctions for breach. The decision below renders all this for naught. Any dissatisfied consumer may take such disputes to court and demand a jury award of treble damages, even if the directly affected carriers have resolved their differences to their complete satisfaction, as AT&T and Verizon did here and as

Congress intended. The practical result is that lay juries will be invited to second-guess expert agencies with regard to complex regulatory policy issues they are ill-equipped to resolve, and to impose duplicative damage awards for violations already remedied (as here, by a $10 million award to AT&T and other competing carriers and a $3 million award to the government).

Relations between the competitor-parties to the thousands of existing inter-carrier agreements are predictably fraught with disagreements over a host of technical details—ranging from the terms of equipment collocation to the price, quality, and speed of unbundling network elements and processing customer orders. If every such dispute is fair game for a consumer antitrust class action, as the court below held, the federal judiciary will be swamped with such claims for decades to come. Congress did not intend that result.

I. THE FEDERAL COURTS ARE DEEPLY DIVIDED OVER THE ISSUES RAISED IN THE PETITION.

The decision below squarely conflicts with the Seventh Circuit's decision in *Goldwasser*. As the court below recognized, the consumer plaintiffs in *Goldwasser* and *Trinko* raised "similar allegations of monopolistic conduct" by an ILEC in its dealings with competing carriers. Pet. App. 31a. But the Second Circuit, unlike the Seventh Circuit, refused to dismiss the complaint.

Whereas the Seventh Circuit ruled that an ILEC's failure to share its network with rivals does not amount to an antitrust violation because such sharing is not an antitrust duty (222 F.3d at 399-400), the Second Circuit ruled that such allegations are sufficient to state an antitrust claim under the essential facilities and monopoly leveraging doctrines. Pet. App. 29a-30a. Whereas the

Seventh Circuit deemed the essential facilities theory inapplicable because the 1996 Act's remedial procedures provide rivals with ready means of access to an ILEC's facilities (222 F.3d at 401), the Second Circuit deemed the Act's inter-carrier remedial procedures irrelevant to essential facilities claims by consumers. Pet. App. 35-36a. Whereas the Seventh Circuit deemed it more appropriate to adjudicate such allegations under the "specific legislation" directed to inter-carrier conduct than under the more "general antitrust laws" (222 F.3d at 401), the Second Circuit rejected the notion that this "specific legislation" had any bearing on the applicability of "the general antitrust laws." Pet. App. 35a. Whereas the Seventh Circuit found that such antitrust suits "could easily conflict" with administrative rulings under the 1996 Act (222 F.3d at 401), the Second Circuit found it "unlikely that allowing antitrust suits would substantially disrupt the regulatory proceedings mandated by the Telecommunications Act." Pet. App. 36a.

The incompatible results in *Goldwasser* and this case are especially striking because the *Goldwasser* complaint was considerably more detailed than respondent's complaint. The consumer plaintiffs in *Goldwasser* alleged that Ameritech controlled "essential facilities" and engaged in "20 specific exclusionary or monopolistic practices." 222 F.3d at 394. By contrast, respondent's complaint alleged only one exclusionary or monopolistic practice (delays in filling orders for competitors' customers), supplemented by a boilerplate allegation that Verizon "ma[de] it difficult for its competitors to provide service." Pet. App. 6a-7a. In the Seventh Circuit's view, the complaint had to be dismissed because, no matter how many allegations it contained, no set of facts could overcome the settled antitrust principle that monopolists have no antitrust duty "affirmatively to help their

competitors." 222 F.3d at 398. The Second Circuit, to the contrary, opined that even the token allegations in respondent's complaint were sufficient to state a claim under the Sherman Act. Pet. App. 30-31a.

In addition to the essential facilities theory, the Second Circuit relied on a version of monopoly leveraging, originally propounded in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), which makes unlawful a firm's use of its market power in one market to obtain a "competitive advantage" in a second market. The decision below has deepened an inter-circuit conflict over whether that theory can support a Section 2 claim.

Several courts of appeals have rejected the *Berkey Photo* leveraging theory. See *Fineman* v. *Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992); *Alaska Airlines* v. *United Airlines*, 948 F.2d 536, 547 (9th Cir. 1991). Other courts of appeals have accepted that theory or refused to dismiss claims relying on it. See *Advanced Health-Care Servs.* v. *Radford Community Hosp.*, 910 F.2d 139, 149 & n.17 (4th Cir. 1990); *Kerasotes Mich. Theatres, Inc.* v. *National Amusements, Inc.*, 854 F.2d 135, 136 (6th Cir. 1988). This Court appeared to put the theory to rest by holding that unilateral conduct violates Section 2 "only when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports* v. *McQuillan*, 506 U.S. 447, 459 (1993).

Numerous federal courts have applied *Spectrum Sports* to reject monopoly leveraging claims, reasoning that a "competitive advantage" in the second market does not violate Section 2 because it represents neither actual monopolization nor the dangerous threat required for attempted monopolization. *E.g.*, *Bepco, Inc.* v. *Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 833 (M.D.N.C. 2000);

Spruce Oil Corp. v. *Archer-Daniels-Midland Co.*, 870 F. Supp. 1005, 1007 (D. Colo. 1994). See generally Joseph Kattan, *The Decline of the Monopoly Leveraging Doctrine*, 9-Fall ANTITRUST 41 (1994). The court below ruled otherwise, without explaining why it failed to follow this Court's reasoning in *Spectrum Sports*. Indeed, the panel's view that attempted monopolization is "derivative" of monopoly leveraging (Pet. 31a n.13) turns *Spectrum Sports* on its head.

These inter-circuit conflicts over the essential facilities and monopoly leveraging theories demand immediate resolution. District courts in over a dozen cases nationally have addressed the scope of the antitrust laws on claims similar to respondent's and reached conflicting rulings. See *supra* n.2. Given the frequency with which disputes arise under thousands of inter-carrier agreements, and given the authorization of the court below for class action lawyers to file claims on behalf of anyone with a telephone, it is certain that the many class actions already generated by *Trinko* are but a small preview of the new litigation burden that will confront the federal courts. The importance of the telecommunications industry to the nation's economy makes it intolerable that identical conduct by carriers with multi-state operations may be an antitrust violation in some parts of the country but not others. This Court's guidance is required to put an end to the waste of private and judicial resources as these issues are debated again and again with inconsistent results.

II. THE COURT BELOW DISREGARDED ESTABLISHED LIMITS ON THE SCOPE OF THE ANTITRUST LAWS.

By endorsing the viability of antitrust lawsuits challenging incumbents' affirmative assistance to competing carriers, the court below created a new category of expansive antitrust duties, improperly extended the

narrow essential facilities doctrine, revived the discredited monopoly leveraging theory of *Berkey Photo*, and discarded established principles of antitrust standing.

The fundamental premise of antitrust law is that vigorous competition, not compelled sharing of resources, yields output and prices that optimally benefit consumers. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984). As the Seventh Circuit recognized in *Goldwasser*, 222 F.3d at 400, antitrust law does not generally impose "affirmative duties to help one's competitors," even on a monopolist. Prior to the 1996 Act, no antitrust court would have required a firm to give up profitable retail sales by selling at substantial discounts to competing retailers. See *Verizon Communications*, 122 S. Ct. at 1681 (competitor access to network facilities was "something brand new under the 1996 Act"). As the 1996 Act's antitrust savings clause makes clear, Congress's policy decision to include such a novel requirement in the Act did not "modify" these established limits on antitrust law. 110 Stat. 56, 143, § 601(b)(1), reprinted as note to 47 U.S.C. § 152. Nevertheless, according to the court below, the essential facilities doctrine permits Verizon's alleged "delay" in affirmatively assisting AT&T to serve as the predicate for an antitrust claim.

This Court has "never adopted" the essential facilities doctrine, *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring), and "scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access." *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 427 n.4 (D.C. Cir. 2002). But even if valid, the essential facilities theory has been narrowly confined because forced access "discourages firms from developing their own alternative inputs" and is more likely to stunt than promote competition. 3A Areeda & Hovenkamp,

ANTITRUST LAW ¶ 771, at 172 (2d ed. 2002); see *Blue Cross* v. *Marshfield Clinic*, 65 F.3d 1406, 1412-1413 (7th Cir. 1995). This risk of undermining the bedrock purpose of the antitrust laws—spurring investment and innovation so as to lower producer costs and consumer prices—counsels against expanding this problematic and controversial doctrine. See *Intergraph* v. *Intel*, 195 F.3d 1346, 1357-1358 (Fed. Cir. 1999) ("an unwarranted extension" of essential facilities doctrine risks harm to competition); *Alaska Airlines*, 948 F.2d at 542-546.

Moreover, as Justice Breyer has observed, "[e]ven the simplest kind of compelled sharing * * * means that someone must oversee the terms and conditions of that sharing." *Iowa Utils. Bd.*, 525 U.S. at 428. Application of the essential facilities doctrine to an ILEC's performance would require *judicial* supervision of such technical industry issues as computerized order processing, switching mechanisms, network component unbundling, and loop and trunk provisioning. Such "intensely practical difficulties" are best left to the expert regulators. *Verizon Communications*, 122 S. Ct. at 1668.

The court below improperly relied on *Otter Tail Power* v. *United States*, 410 U.S. 366 (1973), and *Aspen Skiing* v. *Aspen Highlands Skiing*, 472 U.S. 585 (1985). Pet. App. 29a, 34-35a. The regulatory statute at issue in *Otter Tail* gave the Federal Power Commission "no authority" to order a utility to transmit electric power over its transmission lines to requesting municipalities. 410 U.S. at 375. The 1996 Act, however, authorizes the state commissions (with FCC back-up) to oversee ILECs' treatment of CLECs. There is no precedent for bringing out the heavy artillery of antitrust to compel the very same affirmative assistance that Congress directed state and federal agencies to regulate. In industries subject to extensive regulation, "relief for arbitrary refusals to deal

should be left to common law remedies or to new legislation.* * * It is well within the province of the courts in determining the scope of § 2 to leave such matters to them." 3 Areeda & Turner, ANTITRUST LAW ¶ 736e, at 275-276 (1978).

This is not a "no access" case, such as *Aspen Skiing*, where the defendant totally deprived an existing joint venturer of access to a critical source of business for no legitimate reason. AT&T continues to use Verizon's facilities and services to compete. Failure to perform as quickly as AT&T may demand is not denial of access to an essential facility. See *Ideal Dairy Farms* v. *John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996) (operational business that utilized defendant's premises "was not denied use of [defendant's] facilities"). And no court ever has relied on the essential facilities doctrine to require a firm to provide services to rivals at prices substantially below what it would charge consumers for those same services.

The second ground on which the court below authorized respondent's antitrust claim to proceed, the *Berkey Photo* version of monopoly leveraging, also conflicts with established limits on antitrust law. Far from precluding dominant firms from seeking a "competitive advantage" in other markets, as the *Berkey Photo* theory holds, antitrust law encourages "dominant firms to engage in vigorous competition." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986). Firms may seemingly obtain an "unfair" advantage through innovations and efficiencies that benefit consumers. But the antitrust laws "do not create a federal law of unfair competition." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993); accord *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945) (affirming dismissal of antitrust claims alleging unfair treatment of contracting party).

The Second Circuit's revival of this discredited monopoly leveraging theory was particularly inappropriate because it makes unlawful a purported monopolist's use of its power in wholesaling to create a competitive advantage in retailing. That is simply vertical integration, which provides efficiencies that benefit consumers. It is virtually always lawful under the antitrust laws for a firm to sell what it makes, even if it does so exclusively and disadvantages unintegrated rivals. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 15 (1997); 3A Areeda & Hovenkamp, ANTITRUST LAW ¶¶ 755-759. Thus, the leveraging doctrine has been limited to complementary markets, as in *United States* v. *Griffith*, 334 U.S. 100 (1948), and *Berkey Photo* itself. Under *Trinko*, a manufacturer that vertically integrates into retailing would violate section 2 merely by giving itself a competitive advantage over independent retailers—thereby condemning the very kind of cost savings that the antitrust laws encourage.

The court below not only extended antitrust liability beyond established boundaries, but authorized millions of telephone customers to litigate such novel claims. This Court has made clear that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Associated Gen. Contractors* v. *California Council of Carpenters*, 459 U.S. 519, 535 (1983). Principles of antitrust standing accordingly incorporate such "proximate cause" factors as the directness of the asserted injury, the existence of more directly affected parties, and the speculativeness of the asserted harm. *Id.* at 540-542. The 1996 Act's antitrust savings clause preserves these limitations on the standing of telephone end-users to bring indirect claims under the antitrust laws.

Competing carriers have the incentive and expertise to vindicate their own interests, as well as a "more direct" stake than their customers in the issues raised by respondent. *Associated Gen.*, 459 U.S. at 545; see also *Holmes* v. *SIPC*, 503 U.S. 258, 269-270 (1992). Telephone end-users are poorly positioned to evaluate how ILECs process orders from CLECs or the many other technical details of inter-carrier cooperation. Congress therefore authorized CLECs to compel ILECs to engage in bilateral negotiation and arbitration over their respective rights and duties and to seek review and enforcement in specialized administrative and judicial proceedings. The CLECs have not been shy about doing so, initiating thousands of such regulatory and judicial proceedings all over the country. In these circumstances, respondent's antitrust allegations cannot provide it with standing to litigate issues from which it is remote and about which it can only speculate.

These considerations apply with particular force to a section 2 claim under the essential facilities theory. Prior to the ruling below, courts granted standing to bring an essential facilities claim only to the party allegedly denied access, not to third-party consumers. See *Credit Chequers* v. *CBA*, 1999 WL 253600, at *12 n.18 (S.D.N.Y. 1999) ("The essential facility doctrine is only available to competitors, not to customers"), aff'd, 205 F.3d 1322 (2d Cir. 2000) (table). Far from raising an essential facilities claim, the quality of an end-user's telephone service is precisely the kind of issue that state commissions have resolved for nearly a century.

Consumer standing is particularly unnecessary and counterproductive in this type of case because the CLECs themselves hold the keys to resolving any ILEC misconduct. Respondent's carrier, AT&T, took full advantage of the 1996 Act's regulatory machinery to resolve its grievances with Verizon, obtaining a consent

decree and millions of dollars in damages. Pet. App. 5a. Respondent's antitrust complaint raises the very same issues resolved by the consent decree and alleges injury that is entirely derivative of the injury previously asserted by AT&T. The AT&T-Verizon settlement would mean little if Verizon now must defend against virtually identical claims filed by any of millions of telephone consumers.

The Second Circuit's reliance on *Blue Shield* v. *McCready*, 457 U.S. 465 (1982), to justify antitrust standing in this case was misplaced. In *McCready*, as this Court later explained, the plaintiff was "the *direct* victim of unlawful coercion" by the defendant health plan, which had refused her request for reimbursement. *Associated Gen.*, 459 U.S. at 540 n.44 (emphasis added). In contrast, the plaintiff in *Associated General* was not "a direct victim of the defendants' coercive practices" and thus did not have standing. *Ibid.* Here, too, respondent was not a "direct victim" of Verizon's alleged mistreatment of AT&T and likewise lacks standing to bring derivative antitrust claims. See *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1130-1132 (5th Cir. 1975) (telephone consumers lacked standing to assert antitrust claims against local telephone company for allegedly mistreating other firms); *United States* v. *Western Elec. Co.*, 900 F.2d 283, 310 (D.C. Cir. 1990) (rejecting grant of antitrust standing to "any consumer" of telecommunications services).

These concerns are confirmed by the extraordinary proliferation of class action litigation that has come in the wake of the decision below.[3] A cottage industry is rapidly

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[3] Class actions recently filed on these issues in the last 3 months include *Sandra's Parkside Florist* v. *Bell Atl.*, No. 02-6907 (S.D.N.Y.); *Leider* v. *Bell Atl.*, No. 02-7034 (S.D.N.Y.); *Birnbaum* v. *Bell Atl.*, No. 02-7294 (S.D.N.Y.); *Bartolini Ice Cream* v. *Bell Atl.*, No. 02-7426 (S.D.N.Y.); *Schine* v. *SBC*, No. 302-1624 (D.

developing within the class action bar devoted to monitoring disputes between ILECs and CLECs and racing into court with antitrust complaints that demand treble damages and attorneys' fees. Given the technical complexity of these disputes, such class litigation truly would be a "Frankenstein monster posing as a class action." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 169 (1974). Simply responding to discovery demands would absorb thousands of hours of attorney time. The *in terrorem* effect of these treble-damages class actions will force costly settlements, regardless of the strength of the consumer claims, while discouraging settlements between ILECs and CLECs, such as the settlement between Verizon and AT&T that set the stage for this litigation.

Conn.); *Twombly* v. *SBC*, No. 302-1617 (D. Conn.); *Marcus* v. *Bell Atl.*, No. 02-7435 (S.D.N.Y.); *Srulowitz* v. *Bell Atl.*, No. 02-7437 (S.D.N.Y.); *Superior Jewelry* v. *Bell Atl.*, No. 02-7528 (S.D.N.Y.); *Syncro Servs.* v. *Bell Atl.*, No. 02-7650 (S.D.N.Y.); *Limage* v. *Bell Atl.*, No. 02-7716 (S.D.N.Y.); *Wager* v. *Bell Atl.*, No. 02-7746 (S.D.N.Y.); *Blake* v. *Bell Atl.*, No. 02-7855 (S.D.N.Y.); *Brooks Sumberg* v. *SBC*, No. 302-1787 (D. Conn.); *Etherington* v. *SBC*, No. 302-1801 (D. Conn.); *Dillon* v. *SBC*, No. 302-1811 (D. Conn.); *Feder* v. *SBC*, No. 302-1809 (D. Conn.); *Artie's Auto Body* v. *SBC*, No. 302-1858 (D. Conn.); *Connecticut Tel. & Comm.* v. *SBC*, No. 302-1887 (D. Conn.); *Korab's Truck* v. *SBC*, No. 302-1919 (D. Conn.); *Maury* v. *BellSouth*, No. 02-2729 (N.D. Ga.); *Gwinnett Sound* v. *BellSouth*, No. 02-2743 (N.D. Ga.); *Finnell* v. *BellSouth*, No. 02-2842 (N.D. Ga.); *Treasure Coast* v. *BellSouth*, No. 02-2835 (N.D. Ga.); *Gerber* v. *BellSouth*, No. 02-2858 (N.D. Ga.); *Olshein* v. *BellSouth*, No. 02-61505 (S.D. Fla.); *Dynamic Network* v. *BellSouth*, No. 02-2926 (N.D. Ga.); *Konis* v. *BellSouth*, No. 02-2936 (N.D. Ga.); *Starr Sys.* v. *Bell Atl.*, No. 02-3706 (D. Md.); *Vacation Tan & Travel* v. *Qwest*, No. 02-1978 (D. Colo.); *Spa Universaire* v. *Qwest*, No. 02-1977 (D. Colo.). In a December 9, 2002 filing in *Twombly*, *supra*, respondent's counsel recognized the Circuit split when he represented that "none of us would be here but for *Trinko* and after *Goldwasser*."

These are not issues that must await discovery and the compilation of a summary judgment record. Allowing these costly and burdensome cases to lumber forward through discovery and possibly to trial would conflict with this Court's admonition that courts should dismiss deficient antitrust claims at the pleading stage rather than allow "a potentially massive factual controversy to proceed." *Associated Gen.*, 459 U.S. at 528 n.17. As recognized in *Goldwasser*, this type of case does not raise "the kind of question that requires further development of a factual record" beyond the usual range of judicial notice. See also 2 Areeda et al., ANTITRUST LAW ¶ 307c, at 68, 71 (2d ed. 2000) (claims of a duty to deal and monopoly leveraging present questions of legal "policy, not of fact").

III. THE DECISION BELOW CONFLICTS WITH CONGRESS'S INTENT THAT EXPERT REGULATORS, NOT ANTITRUST JURIES, RESOLVE INTER-CARRIER DISPUTES.

Despite the obvious importance of reconciling the telecommunications and antitrust statutes, the court below failed to follow this Court's approach to evaluating the relationship between regulatory statutes and the antitrust laws. *E.g.*, *United States* v. *Citizens & S. Nat'l Bank*, 422 U.S. 86, 91 (1975) (when applying the antitrust laws, "careful account must be taken of the pervasive federal and state regulation characteristic of the industry"). In these types of cases, this Court analyzes the regulatory scheme as a whole and the type of conduct challenged to effectuate the intent of Congress and to gauge the practical consequences for effective regulatory supervision. *E.g.*, *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 663 (1975); *Pan Am. World Airways* v. *United States*, 371 U.S. 296, 305 (1963); *Hughes Tool Co.* v. *TWA*, 409 U.S. 363, 387 (1973); *National Gerimedical Hosp.* v. *Blue Cross*, 452 U.S. 378, 393 n.18 (1981). This Court long has

recognized that expert agencies often "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to resolve intra-industry disputes. *Far East Conf.* v. *United States*, 342 U.S. 570, 574-575 (1952); Sullivan & Grimes, THE LAW OF ANTITRUST § 14.5, at 746 (2000) (listing cases).

Resolving inter-carrier disputes through antitrust suits is contrary to the intent of Congress. The 1996 Act's "novel" regulatory scheme "broadly extended [federal] law into the field of intrastate telecommunications," with the FCC overseeing national policies and state commissions playing the central role in "specified areas," including "interconnection agreements." *Iowa Utils. Bd.*, 525 U.S. at 385 n.10. The Second Circuit's extension of the antitrust laws to reach consumer complaints over the details of carrier resale and interconnection is inconsistent with Congress's decision to entrust local carrier disputes to expert regulators. Even before the 1996 Act, it had "become clear that comprehensive regulation of the rapidly advancing telecommunications markets was not a task well suited to the federal courts." *Goldwasser*, 222 F.3d at 393. Government by antitrust decree is even less suitable now, after the Act has given expert agencies the "power to prevent or control the challenged conduct." 1A Areeda & Hovenkamp, ANTITRUST LAW ¶ 243f, at 57 (2d ed. 2000).

The Second Circuit's endorsement of parallel state PSC and antitrust court proceedings risks subjecting affected parties to "duplicative and inconsistent standards." *United States* v. *NASD*, 422 U.S. 694, 735 (1975); *Gordon*, 422 U.S. at 689. Lay juries will be asked to apply general antitrust criteria to conduct subject to the specific regulatory standards in the 1996 Act, second-guess expert agency decisions (such as the FCC and PSC orders that resolved the customer order issue raised in

respondent's complaint), apply the Second Circuit's "reasonableness" standard to exceptionally complex and technical issues, and do all this based on a case filed on behalf of nominal plaintiffs with no direct involvement in the resale or interconnection process.

As explained in *Goldwasser*, 222 F.3d at 401, antitrust resolution of claims like those raised here is not "compatible" with the 1996 Act's remedial regime. That regime is based on good-faith negotiations and private agreements in which the carrier parties set the terms. See *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 242 (1996) (antitrust laws should not be expanded in a manner that disrupts good-faith bargaining governed by federal regulation). Here, Verizon and AT&T specified ADR procedures as their "exclusive remedy" in the event of a dispute. Pet. App. 5a. The 1996 Act procedures would become a dead letter if AT&T's customers could file court claims based on that same dispute, engage in lengthy antitrust litigation, and years later obtain a jury verdict at odds with the administrative ruling. In analogous situations, courts have "equitably estopped" nonsignatory third parties from evading a contract's binding arbitration provision when they seek judicial enforcement of obligations arising under a contract with such a provision. *E.g.*, *International Paper* v. *Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000). Congress never intended to permit third-party consumers to nullify the 1996 Act's remedial scheme by filing antitrust lawsuits over the details of carrier relationships that already are scrutinized by expert regulators and implemented through ADR procedures in inter-carrier agreements. See *Howsam* v. *Dean Witter Reynolds*, No. 01-800, slip op. 6 (U.S. Dec. 10, 2002) (the law presumes alignment of decisionmaker and "comparative expertise" to enable "a fair and expeditious resolution of the underlying controversy").

The Second Circuit denied that there is any risk of a "conflict with the regulatory framework" from an action for damages, as opposed to injunctive relief. Pet. App. 38-39a. But it is well established that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). Allowing consumers to bring treble damage class actions based on CLEC grievances about ILEC provisioning will have the same disruptive effect as a judicial injunction.

* * * * *

The exceptional public importance of clear legal rules in the wake of Congress's overhaul of federal telecommunications legislation already has prompted this Court to grant several petitions for certiorari in recent terms. See *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 122 S. Ct. 1753 (2002); *Verizon Communications Inc.* v. *FCC*, 122 S. Ct. 1646 (2002); *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Second Circuit's creation of novel antitrust duties and unfettered consumer standing to enforce them makes this case even more significant in its legal and economic implications than the decisions previously reviewed by this Court. At bottom, the issues raised in the petition concern the proper legal framework for resolving the complex disputes between incumbent and competing carriers that arise on a daily basis. Only this Court can provide the clear national rule urgently needed by the divided lower courts and market participants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The
Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR UNITED PARCEL SERVICE, INC., HONEYWELL INTERNATIONAL INC., VISA U.S.A. INC., AND EASTMAN KODAK COMPANY, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether an allegation that a firm used monopoly power in one market to gain a competitive advantage in a second market states a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, where there is no allegation that the firm's conduct either monopolized the second market or dangerously threatened to do so.

2. Whether an allegation that a firm with lawfully acquired monopoly power made it difficult for a rival to compete against it by failing to grant the rival access to the monopolist's facilities, on terms and conditions that were as favorable as those enjoyed by the monopolist, states a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2.

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INTEREST OF *AMICI CURIAE*[1]

This case involves two important issues in antitrust law – the validity of a theory known as "monopoly leveraging" and the appropriate scope of the "essential facilities" doctrine. The court of appeals held that respondent's allegations stated a claim against petitioner for relief under Section 2 of the Sherman Act, 15 U.S.C. § 2, based on both theories.

United Parcel Service, Inc. (UPS) provides parcel delivery service throughout the United States and worldwide. UPS competes with a wide array of other carriers, including nationwide carriers, a host of trucking companies and private truck fleets, logistics providers, and numerous regional and local companies across the country.

Honeywell International Inc. (Honeywell) is a diversified technology and manufacturing company that provides customers throughout the United States and worldwide with aerospace products and services, control technologies for buildings, homes and industry, specialty chemicals, fibers, plastics and electronic and advanced materials. Honeywell competes with local, regional, national, and global companies in the many industries that it serves.

Visa U.S.A. Inc. (Visa) is a membership corporation owned by approximately 14,000 banks and other financial institutions located throughout the United States and the world. Visa acts as an umbrella organization for its members, providing advertising services to support the Visa brand and technology services to facilitate Visa payment transactions. Visa also regulates and coordinates certain aspects of its members' individual programs through rules and by-laws adopted by its board of directors. Under this

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk along with this brief, as required under Rule 37.2(a). Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, and only the *amici* made a monetary contribution to the preparation and submission of this brief.

umbrella structure, Visa's members issue payment cards to consumers and sign up merchants to accept Visa payment products.

Eastman Kodak Company (Kodak) is a global developer, manufacturer and supplier of imaging products and technologies used by consumers, medical professionals, professional photographers, movie and television producers, government customers and commercial businesses. Kodak operates manufacturing plants, research facilities, distribution centers and business offices throughout the United States.

Because of their nationwide operations, *amici* have a strong interest in the uniform application of the antitrust laws throughout the country, so that their operations and business decisions are not subject to different standards in different jurisdictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' erroneous antitrust rulings will have an impact far beyond the telecommunications industry, which is the context in which the issues in the instant case arise. The antitrust rulings by the court below are independent of the telecommunications statute (*see* Pet. App. 29a, 32a), apply with equal force to every industry, and represent a serious threat to the ability of American businesses to operate efficiently and to maximize consumer welfare.

This case presents important, recurring questions regarding the application of Section 2 of the Sherman Act, 15 U.S.C. § 2, to conduct that does not monopolize or pose a dangerous threat of monopolization in a relevant market. The court of appeals' antitrust rulings sharply conflict with those of other circuits and the teachings of this Court concerning the proper scope of Section 2. Review by this Court would allow it to address substantial uncertainty in antitrust law by resolving a conflict in the circuits about the Second Circuit's "monopoly leveraging" theory, and resolving conflicting interpretations of the scope of the "essential facilities" doctrine.

A. The court of appeals held that respondent may state a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, based on its allegations that Verizon has monopoly power over the wholesale market (where it sells access to its wires), that Verizon used that power to "gain a competitive advantage" in the retail market (where carriers sell local telephone service to customers), and that such conduct purportedly injured respondent. *Id.* at 30a-31a. That ruling revives the so-called "monopoly leveraging theory," which is rooted in the Second Circuit's earlier decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275, 291-293 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The courts of appeals are deeply divided on the question whether an allegation that a firm used monopoly power in one market to "gain a competitive advantage" in a second market states a claim under Section 2 of the Sherman Act. Some courts of appeals have followed the Second Circuit. Other circuits, however, have expressly rejected the theory, concluding that it is contrary to the text and purpose of Section 2, which makes it unlawful only for a person to "monopolize, or attempt to monopolize, or * * * conspire * * * to monopolize" a particular market. 15 U.S.C. § 2. Those courts have determined that "gain[ing] a competitive advantage" does not satisfy that requirement. The Second Circuit's monopoly leveraging theory also is inconsistent with this Court's precedents regarding the scope of Section 2. In *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), the Court emphasized that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Id.* at 459.

B. The court of appeals also held that respondent may state a Section 2 claim under the essential facilities doctrine based on its allegation that Verizon intended to exclude competition "by making it difficult for its competitors to provide services in the Local Phone Service market on the level that [Verizon] is able to provide to its customers in that market," and had no valid business reason for doing so. Pet. App. 6a-7a (quoting Amended Complaint ¶ 52).

That expansive application of the essential facilities doctrine cannot be reconciled with this Court's Section 2 jurisprudence (which has never endorsed the doctrine), or with the application of the essential facilities doctrine by other circuits. The court of appeals' ruling indicates that, as a matter of antitrust law, an alleged monopolist may have to create a wholesale market in its own products in order to allow rivals to purchase and then resell those products in competition with the monopolist in the retail market. That is what the Seventh Circuit correctly recognized is not required by the antitrust laws, *see Goldwasser v. Ameritech*, 222 F.3d 390 (7th Cir. 2000), as other courts have previously held. Moreover, to the extent the court's ruling is read to mean that a plaintiff may claim that an alleged monopolist has a duty under Section 2 to provide access to its facilities to a competitor who is finding it "difficult" to compete, Pet. App. 6a-7a, that ruling suggests that facilities may be considered "essential" merely because it would be expensive or inconvenient for a rival to construct its own facilities. But other courts have held that a facility is "essential" only where it cannot be duplicated due to the fact that the monopoly is a natural monopoly, is legally protected from competition, or is publicly subsidized. Also, other courts have limited the essential facilities doctrine to situations where, absent access to the facility, the competitor cannot compete at all, and have rejected mere difficulty in competing as sufficient to justify application of the doctrine.

C. By extending the reach of Section 2 to conduct that is, in fact, pro-competitive, the court of appeals' decision undermines the fundamental purpose of the antitrust laws – the promotion of vigorous competition. The court of appeals' rule will discourage firms from building efficiently scaled facilities and competing aggressively because competitive success will mean that they must share their business assets with less efficient rivals. Smaller rivals will have no reason to develop

improved products and services to compete with a monopolist if they can obtain access to the larger firm's facilities without doing so.

The consequences of the monopoly leveraging and essential facilities rulings by the court below extend far beyond the field of telecommunications law. The adverse impact of those rulings is evident, particularly in light of the court's other holding that any consumer may bring such claims on the barest of allegations, *see* Pet. 23-26, thus clearing the way for burdensome class actions that will require private parties and the federal judiciary to bear the high costs of litigating lengthy and complex antitrust claims even where there is no allegation (much less proof) of monopolization or a genuine threat thereof. Review of the antitrust issues by this Court is of particular importance to businesses like *amici* that participate in nationwide markets and operate in many jurisdictions. Absent review by this Court, the circuit conflicts on the antitrust issues will subject such firms to disparate standards in different States.

ARGUMENT

REVIEW BY THIS COURT IS WARRANTED BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH RULINGS BY THIS COURT AND SEVERAL OTHER CIRCUITS REGARDING IMPORTANT ANTITRUST DOCTRINES AND BECAUSE THE APPLICATION OF DIFFERENT ANTITRUST STANDARDS IS DISRUPTIVE TO THE MANY BUSINESSES THAT OPERATE IN MULTIPLE JURISDICTIONS

A. The Court Of Appeals' Monopoly Leveraging Theory Conflicts With The Decisions Of Several Other Circuits And Is Inconsistent With This Court's Precedents Regarding The Scope Of Section 2 Of The Sherman Act

The decision below revives a conflict in the circuits over whether an allegation that a firm used monopoly

power in one market as leverage to gain a *nonmonopolistic* competitive advantage in a second market, *i.e.* "monopoly leveraging," states a claim for violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Several courts of appeals have held, contrary to the court below, that such an allegation does not state a Section 2 claim because the text of Section 2 makes it unlawful only for a person to "monopolize, or attempt to monopolize, or * * * conspire * * * to monopolize" a particular market. 15 U.S.C. § 2; 15 U.S.C. § 15(a).

The monopoly leveraging theory applied by the Second Circuit below is rooted in its earlier decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275, 291-293 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The court there recognized the well-established antitrust doctrine that "a firm may not employ its market position as a lever to create or attempt to create a monopoly in another market," and held that that doctrine did not apply in the case before it because the defendant "was never close to gaining control" of the second market. *Id.* at 275 (citing *United States v. Griffith*, 334 U.S. 100 (1948)). The court, nonetheless, also declared that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, *even if there has not been an attempt to monopolize the second market*." *Berkey*, 603 F.2d at 276 (emphasis added).

The Sixth Circuit adopted the Second Circuit's theory in *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135, 137 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989). The Eleventh Circuit recently cited *Berkey* approvingly as well. *See Covad Communications Company v. BellSouth Corp.*, 299 F.3d 1272, 1284 (11th Cir. 2002).

Other circuits, however, have flatly rejected the theory. The Ninth Circuit has disagreed with *Berkey Photo* outright, holding that "[e]ven in the two-market situation, a plaintiff cannot establish a violation of Section 2 without proving that the defendant used its monopoly power in one market to obtain, or attempt to obtain, a monopoly in the downstream, or leveraged, market." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991), *cert. denied*, 5023 U.S. 977 (1992).

The Third Circuit similarly rejected the theory, holding that a plaintiff "may not advance a leveraging claim under [S]ection 2 premised upon [the defendant's] having attained a mere competitive advantage in the relevant * * * market." *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 203 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993). The court explicitly declined to follow *Berkey* because that "formulation of monopoly leveraging to proscribe unilateral restraints of trade does violence to the text of the Sherman Act" which, the court explained, "does not proscribe anti-competitive unilateral conduct that falls shy of threatened monopolization." *Id.* at 205. The court noted (*ibid.*) that that fact "was succinctly set forth" in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 774 (1984). In *Copperweld*, this Court explained that Section 1 of the Sherman Act applies to conduct by two or more firms acting in concert and prohibits unreasonable restraints of trade in such instances, but Section 2 applies only to unilateral conduct and "*leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization)* that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability." *Copperweld*, 467 U.S. at 774.

This Court's decision in 1993 in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, provided further support for rejection of *Berkey*'s monopoly leveraging theory. Although *Spectrum Sports* did not address monopoly leveraging directly, it confirmed the limited reach of Section 2. The Court reversed a lower court ruling that a plaintiff in an attempted monopolization suit was not required to prove that there was a dangerous threat of monopolization of the market by the defendant. *Id.* at 457. The Court explained that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so," and that this standard "is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics." *Id.* at 459; *see also Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S.

209, 225 (1993). The Court emphasized the need to avoid construing Section 2 to "chill competition, rather than foster it." *Id.* at 458. *See also Copperweld Corp.*, 467 U.S. at 768 ("Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.").

Subsequent to *Spectrum Sports*, another circuit rejected the Second Circuit's monopoly leveraging theory. In *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 206 n.16 (5th Cir. 2000), the Fifth Circuit overturned a jury verdict on a Section 2 violation because it was based on an instruction that allowed the finding of a Section 2 violation if defendants used monopoly power " 'to gain a competitive advantage,' even if the defendants did not attempt to monopolize the second market."

The Second Circuit itself had openly questioned the continuing validity of its monopoly leveraging theory in light of *Spectrum Sports*, absent a genuine threat of monopolization. In *AD/SAT v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999), the court ruled that, "[w]hatever the continued scope of monopoly leveraging claims as independent causes of action," it was clear that the plaintiff in that case had not presented evidence to support such a claim. In support of its characterization of the uncertain status of the monopoly leveraging theory, the court cited *Spectrum Sports* and quoted this Court's statement that "[Section] 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Ibid.* (quoting *Spectrum Sports*, 506 U.S. at 459). Other decisions of the Second Circuit also had limited *Berkey Photo*. *See Virgin Atlantic Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001) (noting that it had questioned *Berkey Photo* in earlier decisions and stating that *Spectrum Sports* requires more than a showing that the monopolist "gain[ed] a competitive advantage"); *Twin Labs., Inc. v. Weider Health and Fitness*, 900 F.2d 566, 570-571 (2d Cir. 1990) (indicating that the relevant statement from *Berkey Photo* was dicta and ruling that "tangible harm to competition" is required).

Both before and after *Spectrum Sports*, numerous courts have recognized the disagreement among the circuits regarding the monopoly leveraging theory. No less than four other circuits have noted, but declined to resolve, the question. *See, e.g., Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1359-1360 (Fed. Cir. 1999) (discussing different approaches of various circuits and vacating injunction because it could not be supported on a theory of illegal leveraging); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc.*, 63 F.3d 1540, 1551 n.8 (10th Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996) (recognizing split in the circuits on issue, but not reaching question because it found that plaintiff stated claim for attempted monopolization); *M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168-169 (4th Cir. 1992) (en banc), *cert. denied*, 508 U.S. 972 (1993) (expressly reserving judgment on question of the validity of the monopoly leveraging theory and assuming for purposes of remand that it is a separate Section 2 violation); *Advanced Health Care Services, Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 149 (4th Cir, 1990) (assuming that monopoly leveraging is an independent Section 2 violation, but "reserv[ing] definitive resolution" of the issue); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (per curiam) (emphasizing that it "merely assume[d] for purposes of argument, and [did] not affirm, the legal sufficiency of the leveraging offense described in *Berkey Photo*"; reserving judgment on question in light of "substantial academic criticism cast upon the leveraging concept") (citing *e.g.*, Richard A. Posner & Frank H. Easterbrook, *Antitrust* 802-810, 870-877 (2d ed. 1981); Robert Bork, *The Antitrust Paradox* 365-366, 372-375 (1978)); *see also Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1203 (3d Cir. 1995) (noting that leveraging arguments "have come under increasing attack as economically groundless").

In sum, the Second Circuit's decision in the instant case has reinvigorated the discredited monopoly leveraging theory, in direct conflict with the precedent of at least three other circuits; cannot be reconciled with this Court's precedents; and is creating confusion in the lower courts. Yet, the Second Circuit failed to explain its decision to revive the theory or its basis for disagreeing with the reasoning of several other circuits, despite the Second Circuit's own recent limiting decisions. The Second Circuit's reliance on the theory despite the inconsistencies in its own jurisprudence indicates that it is unlikely that the circuit conflict will be resolved absent review by this Court. The fact that the circuit split will endure unless the Court grants review is further confirmed by the Eleventh Circuit's recent reliance on *Berkey Photo* in approving the monopoly leveraging theory in *Covad Communications Company v. BellSouth Corp.*, 299 F.3d 1272, 1284 (11th Cir. 2002). This Court should grant the petition to resolve the disagreement among the courts below, especially in light of the importance of the issue to businesses operating in nationwide markets, as noted below. *See* pp. 16-19, *infra*.

B. The Court Of Appeals' Application Of The Essential Facilities Doctrine Conflicts With The Decisions Of Several Other Circuits And Expands That Doctrine Beyond The Scope Of Section 2 Of The Sherman Act

The court of appeals' application of the essential facilities doctrine in the instant case also creates a conflict with other circuits regarding the proper reach of that doctrine and cannot be reconciled with this Court's recognition that Section 2 prohibits only conduct that monopolizes or dangerously threatens to do so.

The court of appeals' ruling is of particular significance because the essential facilities doctrine, even when limited by other courts, has "been criticized as having nothing to do with the purposes of the antitrust law." *Blue Cross v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (Posner, J.), *cert. denied*, 516 U.S. 1184 (1996); *see* 3A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 771c, at 173 (2d ed. 2002) ("Lest there be any doubt, we state our belief that the essential facility doctrine is both harmful and unnecessary and should be abandoned"). It is a doctrine "that this Court has never adopted." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985) (finding it "unnecessary to consider the possible relevance of the 'essential facilities' doctrine" and analyzing case under the traditional rubric of Section 2). The court of appeals' ruling below expands that questionable doctrine by broadening the scope of the conduct that is subject to challenge, as well as the scope of facilities that are considered essential.[2]

1. The court of appeals' ruling extends the essential facilities doctrine beyond the reach of Section 2 of the Sherman Act

Focus on the proper scope of Section 2 highlights the extent to which the court of appeals departed from established antitrust doctrine and thereby both failed to adhere to this Court's precedents and created conflicts with

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[2] Petitioner demonstrates that the court of appeals' broad standing ruling presents a circuit conflict. Pet. 23-26. The court's specific ruling that an essential facilities claim can be brought under the Clayton Act by a "consumer plaintiff," "regardless of whether the consumer plaintiff is a competitor of the defendant," Pet. App. 30a n.12, also conflicts with the District of Columbia Circuit's rule that an essential facilities claim may be brought only by a competitor of the monopolist, not by a customer. *See Thomas v. Network Solutions Inc.*, 176 F.3d 500, 509-510 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000); *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless Plc*, 148 F.3d 1080, 1088-1089 (D.C. Cir. 1998); *see also* 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 771a, at 171 ("the general rule [is] that only rivals of the defendant have standing to sue" on an essential facilities claim).

numerous other circuits regarding the essential facilities doctrine.

This Court has repeatedly recognized that Section 2 prohibits only monopolization achieved through anticompetitive practices, not monopoly power acquired or maintained through "a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). And Section 2 does not prohibit a monopolist that acquired its monopoly through such lawful means from charging a monopoly price for its product or service. *Blue Cross*, 65 F.3d at 1413; 3 Areeda & Hovenkamp, *Antitrust Law* ¶ 720a, at 254-256. That is because monopoly pricing does not foreclose competition by others. To the contrary, as the Court recognized in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986), "monopoly pricing may breed quick entry by new competitors eager to share in the excess profits." Moreover, if successful firms were forced to surrender the fruits of their legitimate, competitive activities, companies would have far less economic incentive to compete aggressively to increase their market shares, *see, e.g.*, *Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1481 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992), and such dampening of competition would ultimately harm consumers whom the antitrust laws are intended to benefit. *See Copperweld Corp.*, 467 U.S. at 767.

Section 2 also does not impose on a monopolist a general duty to deal with its competitors, potential competitors, or customers. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). That is because "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986) (citation omitted). The purpose of the antitrust laws, after all, "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports*, 506 U.S. at 458.

What Section 2 does prohibit is firms engaging in conduct that results in the acquisition or maintenance of monopoly power, or genuinely threatens to create monopoly power, by excluding competition "on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605. Whatever the merits of the essential facilities doctrine (*see* pp. 10-11, *supra*), it cannot reach conduct that does not meet the criteria for monopolization or attempted monopolization under Section 2. As the Court has emphasized, "it [is] not enough to inquire 'whether the defendant has engaged in "unfair" or "predatory" tactics'" that "may impose painful losses on the target"; "rather, we insist[ ] that the plaintiff prove a 'dangerous probability that [the defendant] would monopolize a particular market.'" *Brooke Group*, 509 U.S. at 224-225 (citation omitted).

The court of appeals' contrary conclusion reveals a critical flaw in its reasoning. The court characterized respondent's separate claim for attempted monopolization (which the court dismissed) as "derivative of the monopoly leveraging and essential facilities claims." Pet. App. 31a n.13. But monopoly leveraging and essential facilities are merely labels used to describe particular conduct that some courts have held may give rise to a Section 2 violation in certain circumstances. The court of appeals' erroneous ruling that a plaintiff can bring a claim under the essential facilities doctrine (and monopoly leveraging theory) based on alleged conduct that does not monopolize or attempt to monopolize, cannot be reconciled with rulings by this Court and other lower courts that such conduct is beyond the reach of Section 2. *Spectrum Sports*, 506 U.S. at 459.

2. The court of appeals' ruling cannot be reconciled with the essential facilities doctrine as applied in several other circuits

The court of appeals' decision below expands the scope of the essential facilities doctrine, contrary to the rulings of several other circuits.

a. The court of appeals found an essential facilities claim sufficiently stated by respondent's allegations that

Verizon's "conduct had no valid business reason and was intended to exclude competition from the market 'by making it difficult for its competitors to provide service in the Local Phone Service market on the level that [Verizon] is able to provide to its customers in that market.'" Pet. App. 6a-7a (quoting Amended Complaint ¶ 52). The court specified that the claim did not arise out of duties imposed by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 61, because the claim did not cite the relevant statutory provision, 47 U.S.C. § 251. The court indicated that the claim arose out of duties imposed by Section 2 of the Sherman Act. *See* Pet. App. 29a (acknowledging that alleged conduct might also violate Section 251).

That ruling unduly expands the conduct subject to an essential facilities claim. First, no court has held that Section 2 requires a monopolist to provide a competitor access to its facilities in order to create competition in the monopoly market. *See, e.g.*, *Panhandle Eastern Pipe Line*, 935 F.2d at 1484 ("penaliz[ing] the monopolist for refusing to surrender a lawfully obtained monopoly" is "a result courts have long foresworn"). But that is what the ruling below does because, prior to the Telecommunications Act of 1996, Verizon sold local telephone services only at retail. The 1996 Act's duties are what require Verizon to create a wholesale market in which it must sell its services to competitors so that they may resell those services at retail, in competition with Verizon. Now the court of appeals has declared that, as a matter of antitrust law, an alleged monopolist may have to create a wholesale market in its own products in order to allow rivals to purchase and then resell those products in competition with the monopolist in the retail market. That is what the Seventh Circuit correctly recognized in *Goldwasser* is not required by the antitrust laws. *See Goldwasser*, 222 F.3d at 398 ("even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor") (quoting *Aspen Skiing*, 472 U.S. at 600). Although other courts have recognized that the essential facilities doctrine, at best, holds that a monopolist may not use its position in its

monopoly market to prevent competition in a separate market, those courts have not required a monopolist to engage in affirmative conduct to create competition in its monopoly market (as the 1996 Act does). *E.g.*, *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1133, 1148-1149 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983) (requiring AT&T to give MCI access to its local telephone network so as to enable MCI to compete in the long-distance market (not in the local telephone market), but denying MCI's claim for access to AT&T's long-distance network even though such access also would improve MCI's ability to compete in long-distance market).

Second, to the extent the court's ruling is read to mean that a plaintiff may claim that an alleged monopolist has a duty under Section 2 to provide access to its facilities to a competitor who is finding it merely "difficult" to compete on the same level, Pet. App. 6a-7a, that ruling is inconsistent with decisions of other courts. Those courts have limited the essential facilities doctrine to situations where, absent access to the facility, the competitor cannot compete at all (and only, as noted above, when the competitor is foreclosed from competing in a secondary market); they have rejected mere difficulty in competing as sufficient to trigger the essential facilities doctrine. *See Alaska Airlines*, 948 F.2d at 545-546; *City of Chanute v. Williams Natural Gas*, 955 F.2d 641, 648-649 (10th Cir.), *cert. denied*, 506 U.S. 831 (1992), *overruled in part on other grounds by Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (en banc); *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*, 924 F.2d 539, 544-545 (4th Cir.), *cert. denied*, 502 U.S. 814 (1991); *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 370-371 (10th Cir. 1988), *overruled in part on other grounds by Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (en banc).

b. The ruling below also unduly expands the scope of facilities that are considered to be essential. The court of appeals held that respondent stated a Section 2 claim for relief under the essential facilities doctrine based, in the court's words, on an allegation that "creating independent facilities would be prohibitively expensive." Pet. App. 29a.

Respondent couched its allegations in less burdensome terms. *See* Amended Complaint ¶¶ 2, 19, 20, 51 (alleging that access to Verizon's facilities is "important," and that compelled access would make it "easier and cheaper" for competitors to compete because duplicating the facilities would be "expensive" and "time-consuming").

Other courts have held, however, that a facility is essential only where it cannot be duplicated because the monopoly is a natural monopoly, is legally protected from competition, or is publicly subsidized. For example, in *MCI*, 708 F.2d at 1133, the court found that access to the local telephone exchange was essential to competition in the long-distance market because it could not be duplicated due to the existence of a natural and legally protected monopoly, not because duplication would have been expensive or time-consuming. *See also Hecht v. Pro-Football*, 570 F.2d 982, 985-987, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (publicly subsidized stadium); *cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 371 (1973) (facilities depended on exclusive government grants); 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 773b, at 202.

C. The Court of Appeals' Antitrust Rulings Are Contrary To the Purposes of Section 2 of the Sherman Act And Require Review By This Court To Prevent Economic Disruption To The Many Firms That Operate On A Nationwide Basis

The court of appeals' monopoly leveraging theory outlaws certain conduct that merely gives an alleged monopolist a "competitive advantage" in a second market. That theory finds no support in the text of the statute, as demonstrated above. The court of appeals' standard also is inconsistent with the purposes of Section 2 because monopolists and other firms with large market shares often gain a "competitive advantage" through actions that are pro-competitive. For example, firms use vertical integration to lower their costs, and therefore their prices, in a second market, and to provide integrated products that

are more valuable to the consumer. *See, e.g.*, Posner & Easterbrook, *Antitrust*, at 869 ("vertical integration is a potential source of substantial cost savings"). Under the Second Circuit's rule, a plaintiff may allege that such conduct violates Section 2, even though the conduct benefits consumers, on the ground that it harms a competitor by placing it at a competitive disadvantage. The Court has repeatedly warned against the dangers of such rules, which "chill the very conduct the antitrust laws are designed to protect." *Brooke Group*, 509 U.S. at 226 (quoting *Cargill*, 479 U.S. at 122 n.17, and *Matsushita*, 475 U.S. at 594).

Similarly, the court of appeals' expansion of the essential facilities doctrine to require an alleged monopolist to provide competitors with access to its facilities in order to improve the competitors' ability to compete in the monopoly market is contrary to the purposes of Section 2 and will not lead to reduced prices that benefit customers. "[C]onsumers are no better off when [an essential facility] is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone." 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 771b, at 171-172 (explaining why essential facilities doctrine is "inconsistent with antitrust's purpose"). Lower prices would result only if the court also took on the role of regulator to set the price at which the access must be sold. But "[s]uch a solution is nothing less than price regulation of the kind undertaken by regulatory agencies – something for which both the federal courts and the antitrust litigation process are extremely ill-suited." *Id.* at 172. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991).

The court of appeals' rule will discourage firms from building efficiently scaled facilities and competing aggressively because competitive success will mean that they must share their business assets with less efficient rivals; nor will companies "undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those

innovations will be dissipated by the sharing requirement." *AT&T Corp.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part); *see also* 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 771b, at 172. Likewise, smaller rivals will have no reason to develop improved products and services to compete with a monopolist if they can obtain access to the larger firm's facilities without doing so. Indeed, broad application of the essential facilities doctrine may lead to too much cooperation among competitors – a result that the antitrust laws uniformly condemn. *See, e.g., Copperweld*, 467 U.S. at 767-768.

The consequences of the monopoly leveraging and essential facilities rulings by the court below extend far beyond the field of telecommunications law. The court of appeals' ruling that allows entities other than competitors to bring such claims will lead to a torrent of class action claims in many sectors of the economy by consumers who are not directly injured, if they are injured at all, particularly in light of recent application of the ruling by lower courts. *See, e.g., Yankees Entertainment & Sports Network, LLC v. Cablevision Sys. Corp.*, No. 02-Civ-3242, 2002 WL 31010490, *9, *31-*32, *38-*42 (S.D.N.Y. Sept. 4, 2002) (expressly relying on Second Circuit's decision in the instant case to deny motion to dismiss a Section 2 claim under monopoly leveraging theory and essential facilities doctrine, based on allegations that a cable operator refused to grant a regional sports programming "carriage on its system on nondiscriminatory terms such as those terms and conditions available to its affiliates," which caused the latter to have fewer viewers and less revenue); *In re EVIC Class Action Litigation*, No. 02-Civ-2703, 2002 WL 1766554, at *12-*14 (S.D.N.Y. July 30, 2002) (expressly relying on Second Circuit's decision in the instant case to deny motion to dismiss a Section 2 claim under monopoly leveraging theory and essential facilities doctrine, based on allegations that UPS offered package insurance to its customers, but denied other potential package insurers access to the shipping forms and software that UPS provides to its customers); *see also* Pet. 28 n.22 (indicating that "[f]ollowing the Second Circuit's decision, Verizon and other incumbent local telephone companies have been subjected to no fewer than 25 class actions in New York, Connecticut, Georgia, and Colorado").

Review of the antitrust issues by this Court is of particular importance to businesses like *amici* that participate in nationwide markets and operate in many jurisdictions. In light of the deep divisions in the lower courts, only this Court's review can ensure that the operations of firms are not subject to disparate standards in different States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2002

Supreme Court, U.S.
FILED
MAY 2 3 2003
OFFICE OF THE CLERK

No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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The following orders, opinions, and statutes have been omitted in printing this Joint Appendix because they appear on the following pages of the Appendix to the printed Petition for a Writ of Certiorari:

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 1:00CV1910

BELL ATLANTIC, *et al.*,
Petitioner,
v.
LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
3/10/2000	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636 (c); FILING FEE $150.00 RECEIPT # 369125. (em) [Entry date 03/13/00]
5/8/2000	6	ORDER, Amended Complaint due on or before 5/19/00; Deadline for filing of motion to dismiss by 6/19/00; Response to motion deadline 7/21/00; Reply to response to motion deadline 8/4/00; staying discovery until determination of the motion to dismiss and no further adjournments (signed by Judge Sidney H. Stein); Copies mailed. (cd) [Entry date 05/09/00]
5/24/2000	8	STIPULATION and ORDER; Plaintiff shall advise Defendant on or before May 19, 2000 whether it intends to amend the complaint, including by adding additional parties plaintiff, and shall serve any such amended complaint on or before May 26,

DATE	NO.	PROCEEDINGS
		2000; If Plaintiff does not amend the complaint: (a) Defendant shall serve a motion to dismiss the Complaint on or before June 19, 2000; (b) Plaintiff shall serve its answering papers on the motion to dismiss on Defendant on or before July 21, 2000; Defendant shall serve its reply papers on the motion to dismiss on Plaintiff on or before August 4, 2000; There shall be no adjournment of the aforementioned dates; All discovery of the parties is stayed pending resolution of the motion to dismiss; If Plaintiff amends the complaint as provided in paragraph 1 hereof, the parties shall promptly submit to the Court a proposed alternate schedule for Defendant's answering or moving with respect to such amended complaint; The foregoing shall be without prejudice to Plaintiff's amending the Complaint as of right as otherwise permitted by the Federal Rules of Civil Procedure. Plaintiff shall not make a class certification motion until after the resolution of the motion to dismiss; (signed by Judge Sidney H. Stein) (djc) [Entry date 05/26/00] [Edit date 05/31/00]
6/19/2000	9	NOTICE OF MOTION (Fld on Service Date) by Bell Atlantic Corp. to dismiss plntf's complaint in its entirety; Return date not indicated (cd) [Entry date 08/07/00]

DATE	NO.	PROCEEDINGS
8/4/2000	10	MEMORANDUM OF LAW by Bell Atlantic Corp. in support of [9-1] motion to dismiss plntf's complaint in its entirety . (cd) [Entry date 08/07/00]
8/4/2000	11	REPLY MEMORANDUM by Bell Atlantic Corp. re: [9-1] motion to dismiss plntf's complaint in its entirety (cd) [Entry date 08/07/00]
8/8/2000	12	MEMORANDUM OF LAW by Law Offices of in opposition to [9-1] motion to dismiss plntf's complaint in its entirety (cd) [Entry date 08/09/00]
12/6/2000	13	OPINION and ORDER #84888; that for the reasons set forth on this Opinion and Order, the [9-1] motion to dismiss plntf's complaint in its entirety is granted; pltff may replead its Communications Act claim based on the defts alleged violation of 47 U.S.C. 202(a) as well as its supplemental claim for tortuous interference with contract within 20 days of this Opinion and Order. (signed by Judge Sidney H. Stein); Copies mailed. Original document sent to Judgment Clerk. (jp) [Entry date 12/07/00]
12/20/2000	15	NOTICE OF MOTION by Law Offices of for reconsideration of [13-1] order pltff may replead its Communications Act claim based on the defts alleged violation of 47 U.S.C. 202(a) as well as its supplemental claim for tortious interference with contract within 20 days of this Opinion and Order, [13-2] order, for leave to amend complaint,

DATE	NO.	PROCEEDINGS
		granting further and other relief as the Court deems just and proper (Filed on service date). (sl) [Entry date 12/27/00]
12/20/2000	16	MEMORANDUM OF LAW Offices of in support of [15-1] motion for reconsideration of [13-1] order pltff may replead its Communications Act claim based on the defts alleged violation of 47 U.S.C. 202(a) as well as its supplemental claim for tortious interference with contract within 20 days of this Opinion and Order, [13-2] order, [15-2] motion for leave to amend complaint, [15-3] motion granting further and other relief as the Court deems just and proper. (sl) [Entry date 12/27/00]
12/20/2000	17	NOTICE of substitution of attorney for Law Offices of Joseph P. Garland (sl) [Entry date 12/27/00]
12/28/2000	18	JUDGMENT that for the reasons stated in the Court's Opinion (84888) and Order dated 12/6/00, deft's motion to dismiss the complaint is granted with leave to replead within 20 days of the opinion (84888) and Order dated 12/6/00 (Signed by James M. Parkison, Clerk of Court); Mailed copies and notice of right to appeal. Entered on Docket: 12/29/00. (lam) [Entry date 12/29/00]
1/3/2001	19	STIPULATION and ORDER, that the time within which deft may respond to the pltff's motion for reconsideration is extended to 1/19/01, and that the time within which pltff

DATE	NO.	PROCEEDINGS
		may reply to deft's response is extended to 2/5/01; pltff's time within which to replead certain claims under the Court's Opinion and Order dated 12/6/00 is extended to 10 days following the Court's ruling on pltff's motion for reconsideration (or such time and on such terms as the Court may determine in its ruling) (signed by Judge Sidney H. Stein) (lam) [Entry date 01/04/01] [Edit date 01/08/01]
1/9/2001	20	ORDER; that plaintiff's motion for reconsideration is denied, except that plaintiff is granted leave to replead the Sherman Act claim in addition to the claims for violation of Sec. 202 of the Communication Act on or before 1/19/01. (signed by Judge Sidney H. Stein); Copies mailed. (pl) [Edit date 01/10/01]
1/19/2001	21	AMENDED COMPLAINT by Law Offices of (Answer due 2/1/01 for Bell Atlantic Corp.) amending [1-1] complaint ; Summons issued. Jury Trial Demand; (docmt received in night dep. On 01/19/01 at 8:36 p.m.) (djc) [Entry date 01/22/01]
2/5/2001	22	NOTICE OF MOTION (FILED ON SERVICE DATE) by Bell Atlantic Corp. for an order purs. to Rule 12(b)(6) of the F.R.C.P., for an order granting Bell Atlantic's motion to dismiss pltff's amended complaint in its entirety. No return date indicated. (sn) [Entry date 03/06/01]

DATE	NO.	PROCEEDINGS
3/2/3001	23	MEMORANDUM OF LAW BY Bell Atlantic Corp. in support of [22-1] motion for an order purs. to Rule 12(b)(6) of the F.R.C.P., for an order granting Bell Atlantic's motion to dismiss pltff's amended complaint in its entirety. (sn) [Entry date 03/06/01]
3/2/2001	24	MEMORANDUM OF LAW by Law Offices of in opposition to [22-1] motion for an order purs. to Rule 12(b)(6) of the F.R.C.P., for an order granting Bell Atlantic's motion to dismiss pltff's amended complaint in its entirety. (sn) [Entry date 03/06/01]
3/2/2001	25	REPLY MEMORANDUM by Bell Atlantic Corp. in further support of [22-1] motion for an order purs. to Rule 12(b)(6) of the F.R.C.P., for an order granting Bell Atlantic's motion to dismiss pltff's amended complaint in its entirety. (sn) [Entry date 03/06/01]
4/26/2001	26	ORDER granting [22-1] motion for an order purs. to Rule 12(b)(6) of the F.R.C.P., for an order granting Bell Atlantic's motion to dismiss pltff's amended complaint in its entirety. (signed by Judge Sidney H. Stein); Copies mailed. (sn) [Entry date 05/01/01]

DATE	NO.	PROCEEDINGS
5/25/2001	27	CIVIL JUDGMENT; that for the reasons stated in the Court's Order dated 4/26/01, defendant's motion to dismiss the amended complaint is granted. (signed by James M. Parkison, Clerk of Court); Mailed copies and notice of right to appeal. Entered on Docket: 05/30/01. (pl) [Entry date 05/30/01]
6/25/2001	28	NOTICE OF APPEAL by Law Offices of ; from [27-1] judgment order, [26-1] order . Copies of notice of appeal mailed to Attorney(s) of Record: Henry B. Gutman, Dan K. Webb, Richard G. Taranto, Mark C. Hansen and John Thorne. $105.00 Appeal filing fee paid 6/25/01 on receipt # E 409996. (dt) [Entry date 06/26/01]
2/7/2003	31	True Copy of Order from the USCA RE: Pursuant to Rule 12.7 of the rules of the Supreme Court of the United States, you are requested to certify and transmit immediately, the entire record in the above case to this office. CERTIFIED 1/31/03, 02-682, 01-7746, 00CV-1910. ROSEANN B. MACKECHNIE, CLERK, USCA.. (pr) [Entry date 02-20-03]
2/20/2003	—	Indexed record on appeal file sent to the Supreme Court of the United States. Docket # USSC 02-682, USCA 01-7746, USDC 00CV-1910. (pr) [Edit date 02/21/03]
2/20/2003	32	Notice that the record on appeal has been certified and transmitted to the U.S. SUPREME COURT. Docket # USSC 02-682, USCA 01-7746, USDC 00CV-1910. (pr) [Entry date 02/21/03]

UNITED STATES CIRCUIT COURT OF APPEALS
2nd CIRCUIT

Docket No. 01-7746

BELL ATLANTIC,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/5/01	Appellant Law Offices of Curti brief FILED with proof of service. (cv74)
10/5/01	Appellant Law Offices of Curti joint appendix filed w/pfs. Number of volumes: 1. (cv74)
11/5/01	Appellee Bell Atlantic Corp. brief filed with proof of service. (cv74)
11/16/01	Unpublished orders from Appellee Bell Atlantic Corp. received. (Attached to briefs) (cv74)
11/26/01	Appellant Law Offices of Curti reply brief filed with proof of service. (cv74)
11/28/01	Letter dated 11/28/01 from Joseph P. Garland, Esq., enclosing a clean copy of an opinion that was referenced in appellant's reply brief, received. (cv74)
1/10/02	Case heard before SACK, KATZMANN, FLETCHER, C.JJ. (TAPE: 20 & 21) (ca96)

DATE	PROCEEDINGS
5/6/02	Appellee Bell Atlantic Corp. 28(J) letter received. (cv74)
5/23/02	Appellant Law Offices of Curti 28(J) letter received. (cv70)
6/20/02	Judgment of the district court is Affirmed in part, Vacated in part, and Remanded by published signed opinion filed. (RAK) [01-7746] (cv74)
6/20/02	Judge RDS concurring in part and dissenting in part in a separate opinion filed. (cv74)
6/25/02	Errata sheet re: filed. (RDS) (cv74)
7/8/02	Appellee Bell Atlantic Corp. Petition for rehearing, petition for rehearing en banc [2117807-2] with proof of service filed. (cv74)
7/9/02	Movant United States Assoc., Movant BellSouth Corp., Movant SBC Communication motion to file brief as amicus curiae FILED (w/pfs). [2118068-1] (cv74)
7/15/02	Errata sheet re: filed. (RDS) (cv74)
7/15/02	Appellant Law Offices of Curti affidavit in opposition to motion to file brief as amicus curiae [2118068-1] filed (w/pfs.). (cv70)
7/15/02	Appellant Law Offices of Curti memorandum of law in opposition to motion to file brief as amicus curiae [2118068-1] filed (w/pfs). (cv70)
7/18/02	Movant United States Assoc., Movant BellSouth Corp., Movant SBC Communication papers supporting motion #[2118068-1] by Movant United States Assoc., BellSouth Corp., SBC Communication filed. (cv74)

DATE	PROCEEDINGS
8/6/02	Appellant Law Offices of Curti 28(J) letter received. (cv74)
8/14/02	Amended published signed opinion filed. (RAK). (cv74)
8/14/02	Judge RDS Amended concurring in part and dissenting in part in a separate opinion filed. (cv74)
8/30/02	Errata sheet re: filed. (RAK) (cv74)
9/16/02	Order FILED GRANTING motion to file brief as amicus curiae [2118068-1] by Movant United States Assoc., BellSouth Corp., SBC Communication, endorsed on motion form dated 7/9/02. Before: RDS, RAK, C.JJ., BBF, 9th Cir. (AH) (cv74)
9/16/02	Amicus Curiae United States Assoc., Amicus Curiae BellSouth Corp., Amicus Curiae SBC Communication brief filed with proof of service. (cv74)
10/1/02	Order FILED DENYING petition for REHEARING [2117807-1] by Appellee Bell Atlantic Corp., endorsed on motion dated 7/8/02., DENYING petition petition for rehearing in banc [2117807-2] by Appellee Bell Atlantic Corp., endorsed on motion dated 7/8/02. (AH) (cv74)
10/8/02	Judgment MANDATE ISSUED. (cv74)
11/12/02	Notice of filing petition for writ of certiorari for Appellee Bell Atlantic Corp. dated 11/6/02 filed. Supreme Ct#: 02-682. (cv74)

DATE	PROCEEDINGS
1/22/03	Letter dated 1/16/03 from the Supreme Court of the United States, requesting a certified copy of the record, and all briefs and exhibits. (Supreme Court # 02-682) (cv74)
1/31/03	Acco, briefs, and appendices transmitted to the Supreme Court of the United States. (cv74)
2/14/03	Certified copy of the U.S.S.C. request to trasnmit the filings in this Court receipt returned from the district court. (cv74)
2/26/03	Certified copy of receipt returned from the district court.(ret)
3/17/03	Certified copy of Supreme Court order GRANTING petition for writ of certiorari [2201822-1] by Appellee Bell Atlantic Corp., endorsed on motion form dated 11/12/02. dated 3/10/03. The petition for writ of certiorari is granted. Limited to the following Question: "Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?" (cv74)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

00 CIV. 1910

LAW OFFICES OF CURTIS V. TRINKO, LLP, individually and on behalf of all others similarly situated,
Plaintiff,

against

BELL ATLANTIC CORPORATION,
Defendant.

COMPLAINT
JURY TRIAL DEMANDED

Plaintiff, for its Class Action Complaint, alleges on information and belief as follows:

I.

OVERVIEW OF THE ACTION

1. This is a class action that arises from a policy by Defendant, Bell Atlantic, to use its control over the physical wires over which phone services are delivered to business and homes in the geographic market in which has historically provided local, non-wireless telephone service—i.e. New England and the Mid-Atlantic States—to impair its competitors' customers' ability to obtain local telephone service and to hinder efforts by AT&T and others to enter into the business of providing local telephone service, while providing adequate services to customers using Bell Atlantic for their local phone service. The Class consists of customers who were damaged by Bell Atlantic as a result of such conduct.

2. Access to Bell Atlantic's wires is essential for the provision of local telephone service. By making it difficult for AT&T and others, and ultimately their local telephone service customers, to obtain full use of those local lines on a non-discriminatory basis, Bell Atlantic has deterred and will continue to deter potential customers from switching to another company for local telephone service or cause customers that had switched to switch back to Bell Atlantic in frustration for the poor services rendered by their new local phone service provider, ironically as a direct result of Bell Atlantic's own conduct.

3. This action asserts claims against Bell Atlantic for violations of section 202 of the Federal Communications Act of 1934 (the "FCA"), 47 U.S.C. § 202; section 251 of the Telecommunications Act of 1996 (the "1996 Act"), 47 U.S.C. § 251; section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2; and for interference with the contractual relationships established by Class members with providers of local telephone service by a company other than Bell Atlantic.

The 1996 Telecommunications Act.

4. This action largely derives from the sea change contemplated by the Telecommunications Act of 1996.

5. Until 1982, American Telephone & Telegraph Co. ("AT&T") dominated the national telecommunications industry, controlling virtually all long-distance telephone service, most local telephone service, and a substantial amount of telephone equipment manufacturing. In 1982, however, AT&T entered into an antitrust consent decree in an action brought against it by the United States Justice Department, which ended its industry dominance.

6. The decree split AT&T from its local telephone service subsidiaries, known as "Baby Bells." By doing so, the decree sought to encourage new competition in long-distance service by firms such as MCI and Sprint. It also encouraged new competition in telephone equipment markets.

7. The decree, however, did not introduce new competition into the local telephone service markets. Rather, it left each local market in the hands of a single state-regulated local service supplier, such as (at the time) New York Telephone or NYNEX in New York and Bell Atlantic in Washington, D.C. At the same time, the decree forbade most such local service suppliers from entering long-distance markets. That prohibition, by preventing entry by local firms willing and able to supply long-distance service, risked less long-distance competition. But the decree reflected a countervailing concern that local firms might enjoy special long-distance advantages not available to purely long-distance companies.

8. There ensued competition in the United States for the provision of interstate long-distance telephone service.

9. In 1996, Congress enacted the 1996 Act. It altered the postdecree status quo in two important ways. First, it created a legal method through which local telephone service companies may enter long-distance markets, thereby providing additional long-distance competition. *See* 47 U.S.C. § 271(c)(2)(B) (listing 14 conditions that, if met, permit incumbent local firms to enter long-distance market). Second, it conditioned that long-distance entry upon either (1) the introduction of competition into local markets or (2) the failure of a competing carrier to request access to or interconnection with the local service supplier (or the competing carrier's failure to engage in "good faith" negotiations). 47 U.S.C. §§ 271(c)(1)(A), (B).

10. Among other things, the 1996 Act was meant to promote new local entry by requiring incumbents (*i.e.*, Bell Atlantic in the geographic market at issue in this case) (1) to "interconnect" with new entrants (thereby allowing even a partial new entrant's small set of subscribers to call others within an entire local area), 47 U.S.C. § 251(c)(2); (2) to sell retail services to new entrants at wholesale rates (thereby allowing newly entering firms to become "resellers,"

competing in retailing), 47 U.S.C. § 251(c)(4); and (3) to provide new entrants "access to network elements," say, house-to-street telephone lines, "on an unbundled basis" (thereby allowing new entry in respect to some aspects of the local service business without requiring wasteful duplication of the entire business), 47 U.S.C. § 251(c)(3). In August 1997, NYNEX and Bell Atlantic merged to form Bell Atlantic. Upon such merger, Bell Atlantic provided local telephone service in New England and the Middle Atlantic States, from New York south to Virginia and West Virginia.

11. Bell Atlantic has applied for and received necessary regulatory permission in certain parts of the Geographic Market (defined below) to offer long-distance telephone service, including in New York, although AT&T has said that it intends to ask the Federal Communications Commission to suspend that authority because of Bell Atlantic's failure to provide adequate, but necessary, support for other companies (including AT&T) seeking to offer customers Local Phone Service (defined below) in New York.

12. In fact, since the entry of competitors in the Local Phone Service market in the Geographic Market, with respect to the support from Bell Atlantic that is necessary for such competitors to provide adequate support for their customers, Bell Atlantic has provided a level of service that is materially below the level that is accorded customers of Bell Atlantic's Local Phone Service in functionally identical circumstances. As a result of this practice, the customers of Bell Atlantic's competitors in this market have been damaged.

II.

JURISDICTION AND VENUE

13. This Complaint alleges violations of section 202(a) of the FCA, as amended, 47 U.S.C. § 202(a), section 251 of the Telecommunications Act of 1996, 47 U.S.C. § 251, and

section 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 2. It also invokes the Court's supplemental jurisdiction with respect to the Class's claim that arises under state common law.

14. The jurisdiction of this Court exists pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26; section 207 of the FCA, as amended, 47 U.S.C. § 207; and sections 1331 and 1337 of the United States Judicial Code, 28 U.S.C. §§ 1331 and 1337.

15. Bell Atlantic is found or transacts business in the Southern District of New York, and venue in this Court therefore exists pursuant to section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. § 1391(b). In addition, Bell Atlantic has sufficient contacts with the Southern District of New York so as to make it subject to personal jurisdiction in this District were the Southern District of New York a separate state, and venue in this Court therefore exists pursuant to section 1391 of the Judicial Code, 28 U.S.C. § 1391(c).

III.

PARTIES

16. Plaintiff is a limited liability partnership organized under New York Law.

17. Defendant Bell Atlantic Corporation ("Bell Atlantic"), is a Delaware corporation with its principal offices at 1095 Avenue of the Americas, New York, New York 10036.

IV.

THE RELEVANT MARKETS AND BELL ATLANTIC'S MARKET POWER

18. The relevant product market for purposes of analyzing the effects of the conduct under section 2 of the Sherman Act in this case is the provision of non-wireless local telephone services ("Local Phone Service"). This market consists of

the provision of local, non-wireless telephone services to customers and the physical facilities that make such services possible.

19. The relevant geographic market for purposes of analyzing the effects of the conduct under section 2 of the Sherman Act in this case is those areas in which Bell Atlantic is the "incumbent local exchange carrier" ("ILEC") within the meaning of the 1996 Act, viz. all of New England, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia (the "Geographic Market").

20. Within the Geographic Market, Bell Atlantic has a monopoly with respect to "local loops" and "local switches." While there are some smaller companies within the Geographic Market that provide local loops and local switches, these tend to be small local telephone companies serving areas, often rural, that were not deemed attractive enough for AT&T, areas recently referred to as "Never-Ever-Bell Land."

21. The local loop is the wireline—a twisted pair of copper wires, coaxial cable, fiber optic cable, or the like—that links the customer's premises to a central switching station. Telephone calls are then directed from the central switching station to their destinations.

22. Currently, the barriers to entry in the provision of local loops are high. Particularly in the Geographic Market, where most premises are in long-standing structures, it would be prohibitively expensive for a potential market entrant to duplicate the existing local loops directly to its own customers.

23. The affected product market is the provision of local, non-wireless telephone service, i.e. Local Phone Service.

24. Bell Atlantic provides Local Phone Service in the Geographic Market and has done so, including through its predecessors, since the break-up of AT&T.

25. In order to provide Local Phone Service in the Geographic Market, a company must have access to the Local Loop owned and controlled by Bell Atlantic.

V.

FACTS

26. On August 14, 1997, Bell Atlantic Corporation and NYNEX Corporation merged. Before that, they were two of the "Baby Bells."

27. According to its most recent Form 10-Q, "Bell Atlantic is a telecommunications company that operates in a region stretching from Maine to Virginia. Our principal operating subsidiaries are: New York Telephone Company, Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., New England Telephone and Telegraph Company, Bell Atlantic-Maryland, Inc., Bell Atlantic Virginia, Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic-Delaware, Inc., Bell Atlantic-Washington, D.C., Inc. and Bell Atlantic Mobile."

28. At least since the enactment of the 1996 Act, the market for the provision of Local Phone Service has been open to all.

29. In order to provide Local Phone Service in the Geographic Market, companies must have access to the Local Loop.

30. Throughout the Class Period, Bell Atlantic has not afforded other companies access to the Local Loop on a par with its own access.

31. Among other things, Bell Atlantic has fulfilled orders of other Local Phone Service providers' customers after fulfilling those for its own Local Phone Service, has failed to fill a substantial number of orders for other Local Phone Service providers' customers substantially identical in

circumstances to its own Local Phone Service customers for whom it has filled orders, and has systematically failed to inform other Local Phone Service providers of the status of their orders with Bell Atlantic concerning their (the other Local Phone Service providers') customers.

32. On March 9, 2000, Bell Atlantic agreed to pay a $3 million fine to the U.S. Treasury pursuant to a consent decree entered into between Bell Atlantic and the Federal Communications Commission arising out of Bell Atlantic's failure to provide adequate access to Local Phone Service competitors in New York to the level required when the Federal Communications Commission allowed Bell Atlantic to offer long-distance telephone service to New Yorkers and to pay $10 million in compensation to competing Local Phone Service providers in New York for injury caused to them as a result of Bell Atlantic's misconduct in handling orders from such competing Local Phone Service providers.

VI.

INTERSTATE TRADE AND COMMERCE

33. The conduct of Bell Atlantic described in this Complaint was in, and has affected, interstate trade and commerce. In 1998, Bell Atlantic's annual revenues were just shy of $3 billion.

34. The activities of Bell Atlantic, as described herein, were within the flow of, and substantially affected, interstate commerce.

VII.

CLASS ACTION ALLEGATIONS

35. Plaintiff brings this action on its own behalf and as a class action pursuant to rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of all those who were customers of a company other than Bell Atlantic with

respect to the provision of Local Phone Service at any time since February 6, 1996 and who were damaged by the conduct complained of herein (the "Class").

36. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of members of the Class can only be determined by appropriate discovery, the Class members number in thousands.

37. Plaintiff's claims are typical of the claims of the other members of the Class. Plaintiff and all other members of the Class sustained damage to their business and property interests as a result of the wrongful conduct complained of herein.

38. Plaintiff will fairly and adequately protect the interests of the other members of the Class, and have retained counsel competent and experienced in class action, and antitrust litigation.

39. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for Class members individually to seek redress for the wrongful conduct alleged herein.

40. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether Bell Atlantic failed to provide non-discriminatory access to the local loops and other infrastructure necessary for the provision of Local Phone Service in the Geographic Market to or for the benefit of customers of Bell Atlantic's competitors in the provision of Local Phone Service;

(b) whether Bell Atlantic had a monopoly in the local loops in the Geographic Market;

(c) whether Bell Atlantic used its monopoly power in local loops in the Geographic Market to provide itself with an inappropriate competitive advantage in the Local Phone Service market in the Geographic Market;

(d) whether Bell Atlantic has violated the 1996 Act, the FCA, or the Sherman Act as a result of the conduct complained of herein;

(e) whether Plaintiffs and the other members of the Class have sustained damages to their business and property interests as a result of the wrongful conduct of Bell Atlantic alleged herein and, if so, the appropriate measure thereof;

(f) whether Bell Atlantic has improperly interfered with the contracts for the provision of Local Phone Service entered into between Plaintiff and the other members of the Class and their respective non-Bell Atlantic Local Phone Service provider; and

(g) whether Bell Atlantic should be enjoined from continuing to violate the Sherman Act, the FCA, and the Telecommunications Act of 1996.

41. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

42. The names and addresses of the members of the Class can be obtained from the Bell Atlantic competitors that provided Local Phone Service to them. Notice can be provided to such Class members using techniques and a form of notice similar to those customarily used in class actions.

AS AND FOR A FIRST
CLAIM FOR RELIEF
For Damages
Section 251 of Telecommunications Act of 1996

43. Plaintiff repeats and realleges the allegations of paragraphs 1 through 42 as if fully set forth in this paragraph.

44. Bell Atlantic is a "local exchange carrier" ("LEC") within the meaning of the 1996 Act.

45. Under section 251(b) of the 1996 Act, Bell Atlantic, as a LEC, had several obligations:

> (1) Resale. The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.
>
> . . . .
>
> (3) Dialing parity. The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.
>
> (4) Access to rights-of-way. The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 [47 U.S.C. § 224].
>
> (5) Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

47 U.S.C. § 251(b).

46. Bell Atlantic is an "incumbent local exchange carrier" ("ILEC") for the relevant Geographic Market herein within

the meaning of the 1996 Act because on February 8, 1996, the date of enactment of the 1996 Act, it provided telephone exchange service in that market and was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Federal Communications Commission's regulations (47 C.F.R § 69.601(b)).

47. As an ILEC, Bell Atlantic also had, under the 1996 Act, the following obligations:

> (1) Duty to negotiate. The duty to negotiate in good faith in accordance with section 252 [47 U.S.C. § 252] the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.
>
> (2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
>
> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 [47 U.S.C. § 252].

(3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 [47 U.S.C. § 252]. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale. The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

. . . .

(6) Collocation. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual

collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

47 U.S.C. § 251(c).

48. By reason of the conduct complained of herein, Bell Atlantic has violated section 251(b) of the 1996 Act by:

(a) imposing "unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services";

(b) failing to provide "nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays";

(c) not "afford[ing] access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224" of the FCA;

(d) failing "reciprocal compensation arrangements for the transport and termination of telecommunications."

49. By reason of the conduct complained of herein, Bell Atlantic has violated section 251(c) of the 1996 Act by:

(a) failing "to negotiate in good faith . . . the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of" section 251(b) of the 1996 Act;

(b) failing "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

"(A) for the transmission and routing of telephone exchange service and exchange access;

"(B) at any technically feasible point within the carrier's network;

"(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

"(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."

(c) failing "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252" and failing to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

(d) failing "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers" and imposing "unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service"; and

(e) failing "to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier."

50. With respect to Bell Atlantic's obligations under section 251 of the 1996 Act, the provider of Local Phone Service to Plaintiff and the other members of the Class are "requesting telecommunications carriers."

51. As a "common carrier," under section 207 of the FCA, Bell Atlantic is liable to Plaintiff and the other members of the Class who have been damaged by Bell Atlantic's violation of section 251 of the 1996 Act in an amount to be determined at trial.

52. Plaintiff and the other members of the Class have not asserted the claims set forth in this Complaint that arise under section 251 of the 1996 Act before the Federal Communications Commission.

AS AND FOR A SECOND
CLAIM FOR RELIEF
For Damages
Section 202 of Federal Communications Act of 1934

53. Plaintiff repeats and realleges the allegations of paragraphs 1 through 52 as if fully set forth in this paragraph.

54. Section 202(a) of the FCA provides that:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a).

55. Bell Atlantic is a "common carrier" within the meaning of section 202(a) of the FCA.

56. Bell Atlantic's conduct complained of herein, has violated section 202(a) of the FCA in that Bell Atlantic has engaged in and continues to engage in "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

57. The class of persons discriminated against are competitors of Bell Atlantic in the provision of Local Phone Service and the customers of such Bell Atlantic competitors, including Plaintiff and the other members of the Class.

58. As a "common carrier," under section 207 of the FCA, Bell Atlantic is liable to Plaintiff and the other members of the Class who have been damaged by Bell Atlantic's violation of section 202 of the FCA in an amount to be determined at trial.

59. As a consequence of Bell Atlantic's practice of discrimination, described above, plaintiff and the other members of the class have suffered actual damages in an amount to be proved at a trial.

60. Plaintiff and the other members of the Class have not asserted the claims set forth in this Complaint that arise under section 202 of the FCA before the Federal Communications Commission.

AS AND FOR A THIRD
CLAIM FOR RELIEF
For Damages and Injunctive Relief
Section 2 of the Sherman Act Against All Bell Atlantic

61. Plaintiff repeats and realleges the allegations of paragraphs 1 through 60 as if fully set forth in this paragraph.

62. Bell Atlantic has monopoly power in the provision of the local loop necessary for Local Phone Service in the Geographic Market.

63. Bell Atlantic has used its monopoly power in the local loop market to gain a competitive advantage in the market for the provision of Local Phone Service in the Geographic Market.

64. Bell Atlantic has engaged in exclusionary and anti-competitive behavior by, *inter alia*, attempting to exclude rivals in the Local Phone Service on a basis other than efficiency, i.e. by making it difficult if not impossible for its competitors to provide service in the Local Phone Service on the level that Bell Atlantic is able to provide service to its customers in that market. This conduct has had an impact on consumers and has impaired competition in the Local Phone Service in an unnecessarily restrictive way.

65. There is no valid business reason for Bell Atlantic's behavior with respect to providing access to the local loop market. This conduct has directly and adversely impacted upon the ability of consumers, including Plaintiff and the other members of the Class, to obtain satisfactory Local Phone Service. It has also caused substantial injury to competitors with Bell Atlantic in the provision of service in the Local Phone Service.

66. Bell Atlantic's behavior served no legitimate business purpose.

67. Bell Atlantic's behavior poses and has poses a substantial threat to competition in the Geographic Market's Local Phone Service market.

68. As a result of the foregoing, Bell Atlantic have violated section 2 of the Sherman Act.

69. As a result of the foregoing, Plaintiff and the other members of the Class have been injured in their business and property interests by Bell Atlantic' violation of section 2 of the Sherman Act in an amount to be determined at trial.

70. Bell Atlantic' unlawful conduct is continuing and unless equitable relief is granted competition in the Local Phone Service in the Geographic Market will be substantially and improperly adversely impacted.

71. Plaintiff and the other members of the Class have no adequate remedy at law.

AS AND FOR A FOURTH
CLAIM FOR RELIEF
For Damages
Tortious Interference with Contract

72. Plaintiff repeats and realleges the allegations of paragraphs 1 through 71 as if fully set forth in this paragraph.

73. Plaintiff and the other members of the Class had valid contracts with companies other than Bell Atlantic for the provision of Local Phone Service within the Geographic Market.

74. Bell Atlantic had knowledge of each of those contracts.

75. Insofar as the companies other than Bell Atlantic that Plaintiff and the other members of the Class had contracts for the provision of Local Phone Service within the Geographic Market were unable to provide satisfactory service to those customers and therefor breached their contracts with those

customers as a result of Bell Atlantic's conduct complained of in this Complaint, Bell Atlantic intentionally procured the breaches of those contracts.

76. Plaintiff and the other members of the Class have been damaged as a result of the breaches by their respective non-Bell Atlantic Local Phone Service providers.

77. By reason of the foregoing, Bell Atlantic is liable to Plaintiff and the other members of the Class for having intentionally interfered with their contracts with their respective non-Bell Atlantic Local Phone Service providers in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of itself and the other members of the Class, prays for judgment as follows:

(i) Declaring this action to be a proper class action pursuant to rule 23(b) of the Federal Rules of Civil Procedure on behalf of the Class defined in paragraph 36 hereof, declaring Plaintiff to be an adequate representative of that Class, and declaring Plaintiff's counsel to be counsel to the Class;

(ii) Adjudging and decreeing that Bell Atlantic has violated the Federal Communications Act of 1934, the Telecommunications Act of 1996, the Sherman Antitrust Act of 1890, and the common law;

(iii) Awarding judgment against Bell Atlantic in an amount to be determined at trial for its violations of the Federal Communications Act of 1934, the Telecommunications Act of 1996, and the common law for damages suffered by Plaintiff and the other members of the Class as a result of these violations;

(iv) Awarding judgment against Bell Atlantic in an amount to be determined at trial for its violations of

Sherman Antitrust Act of 1890 for three times the damage to the business and property interests suffered by Plaintiff and the other members of the Class as a result of Bell Atlantic's violations, plus attorneys' fees, costs, and interest as allowable by law;

(v) Enjoining Bell Atlantic from continuing to provide access to the local loop market in the Geographic Market to providers of Local Phone Service other than itself on terms and conditions that are not as favorable as those enjoyed by Bell Atlantic;

(vi) Permanently enjoining Bell Atlantic from providing access to the local loop market in the Geographic Market to providers of Local Phone Service other than itself on terms and conditions that are not as favorable as those enjoyed by Bell Atlantic;

(vii) Awarding attorneys' fees and costs in this action; and

(viii) Granting such other relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demand a trial by jury on all issues triable by jury.

Dated: New York, New York
March 10, 2000

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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00 Civ. 1910 (SHS) (JCL)

LAW OFFICES OF CURTIS V. TRINKO, LLP, individually and on behalf of all others similarly situated,

Plaintiff,

against

BELL ATLANTIC CORPORATION,

Defendant.

AMENDED COMPLAINT
JURY TRIAL DEMANDED

Plaintiff, for its Amended Class Action Complaint, alleges on information and belief as follows:

OVERVIEW OF THE ACTION

1. This is a class action that arises from a policy by Defendant, Bell Atlantic, to use its control of the physical wires over which phone services are delivered to businesses and homes in the region in which it has historically provided local, non-wireless telephone service—i.e., most of New England and the Mid-Atlantic States—to enhance or protect its dominant position in the provision of local phone service to consumers in that region. The means to this end include (i) discriminating against those users of its physical wires who are customers of local phone service companies other than Bell Atlantic, in violation of the Federal Communications Act of 1934; (ii) using its control over those physical wires to maintain or increase its control of the local phone service market in the region, in violation of the Sherman Antitrust Act of 1890; and (iii) interfering with the contracts that

customers of its local phone service competitors have with those competitors, in violation of state law. The Class consists of those local phone service customers in the region who were damaged by Bell Atlantic as a result of such improper conduct.

2. Access to Bell Atlantic's wires is important for the provision of local phone service. Local phone service, in essence, is a dial tone and the ability to make local telephone calls and to gain access to a long distance carrier for other calls. Access to Bell Atlantic's wires is important to obtain and maintain local phone service, particularly for moving locations and adding lines and other services. By making it difficult for AT&T and others, and their local telephone service customers, to obtain full use of those local lines on the same basis as it enjoyed, Bell Atlantic has deterred and will continue to deter potential customers from switching to another company for local phone service or cause customers that had switched to switch back to Bell Atlantic in frustration for the poor services rendered by their new local phone service provider, ironically as a direct result of Bell Atlantic's own conduct. As a result of such conduct, Bell Atlantic intends to enhance or maintain its dominant position in the market for the provision of local phone service in the region or, insofar as it does not have a monopoly position, to acquire one.

3. This action asserts claims against Bell Atlantic for violations of section 202 of the Federal Communications Act of 1934 (the "FCA"), 47 U.S.C § 202; and section 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 2. It also asserts state law claims for tortious interference with the contractual relationships established by Class members with providers of local telephone service by a company other than Bell Atlantic.

Background

4. Until 1982, American Telephone & Telegraph Co. ("AT&T") dominated the national telecommunications

industry, controlling virtually all long-distance telephone service, most local telephone service, and a substantial amount of telephone equipment manufacturing. In 1982, however, AT&T entered into an antitrust consent decree in an action brought against it by the United States Justice Department, which ended its industry dominance.

5. The decree split AT&T from its local telephone service subsidiaries, known as "Baby Bells." By doing so, the decree sought to encourage new competition in long-distance service by firms such as MCI and Sprint. It also encouraged new competition in telephone equipment markets.

6. The decree, however, did not introduce new competition into the local telephone service markets. Rather, it left each local market in the hands of a single state-regulated local service supplier, such as (at the time) New York Telephone or NYNEX in most of New York and Bell Atlantic in Washington, D.C.

7. There ensued competition in the United States for the provision of interstate long-distance telephone service.

8. This action largely derives from the sea change contemplated by the Telecommunications Act of 1996 (the "1996 Act"), which amended the FCA. While the claims asserted herein do not arise under the 1996 Act, that statute created the market structure that has been adversely affected by Bell Atlantic's misconduct, to the injury of Plaintiff and the other members of the Class. In particular, the 1996 Act ended the legal approval of the monopoly that Bell Atlantic and the other Baby Bells had had for the provision of local telephone service in their respectively parts of the country after the 1982 break-up of AT&T.

9. Firms that provided local phone service before the 1996 Act are known as Incumbent Local Exchange Carriers, or "ILECs." Those firms that entered the local phone service market after 1996 are known as Competitor Local Exchange Carriers, or "CLECs."

10. In August 1997, NYNEX and Bell Atlantic merged to form Bell Atlantic. Upon such merger, Bell Atlantic provided local telephone service in most of New England and the Middle Atlantic States, from New York south to Virginia and West Virginia. The relevant geographic market herein is those areas in which Bell Atlantic is the ILEC, viz., most of or all of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, the District of Columbia, and those portions of Connecticut and other states in which Bell Atlantic is the ILEC (the "Geographic Market"). Not included in the Geographic Market are those portions of these states in which Bell Atlantic was not the ILEC, such as Rochester in New York.

JURISDICTION AND VENUE

11. This Complaint alleges violations of section 202(a) of the FCA, as amended, 47 U.S.C. § 202(a), and section 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 2. It also invokes the Court's supplemental jurisdiction with respect to the Class's claims that arise under state common law.

12. The jurisdiction of this Court exists pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26; sections 206 and 207 of the FCA, as amended, 47 U.S.C, §§ 206, 207; and sections 1331 and 1337 of the United States Judicial Code; 28 U.S.C. §§ 1331 and 1337.

13. Bell Atlantic is found or transacts business in the Southern District of New York, and venue in this Court therefore exists pursuant to section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. § 1391(b). In addition, Bell Atlantic has sufficient contacts with the Southern District of New York so as to make it subject to personal jurisdiction in this District were the Southern District of New York a separate state, and venue in this Court therefore exists pursuant to section 1391 of the Judicial Code, 28 U.S.C. § 1391(c).

PARTIES

14. Plaintiff Law Offices of Curtis V. Trinko, LLP, is a limited liability partnership organized under New York law with its principal office in New York, New York, within the Geographic Market.

15. Defendant Bell Atlantic Corporation ("Bell Atlantic"), is a Delaware corporation with its principal offices at 1095 Avenue of the Americas, New York, New York 10036. On June 30, 2000, Bell Atlantic and GTE Corporation completed a merger as a result of which GTE Corporation became a wholly-owned subsidiary of Bell Atlantic. With the closing of the Merger, the combined company began doing business as Verizon Communications Inc.

FACTS

16. On August 14, 1997, Bell Atlantic Corporation and NYNEX Corporation merged. Before that, they were two of the "Baby Bells."

17. According to a Bell Atlantic Form 10-Q that predated its merger with GTE, "Bell Atlantic is a telecommunications company that operates in a region stretching from Maine to Virginia. Our principal operating subsidiaries are: New York Telephone Company, Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., New England Telephone and Telegraph Company, Bell Atlantic-Maryland, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic-Delaware, Inc., Bell Atlantic-Washington, D.C. Inc. and Bell Atlantic Mobile."

18. Although Verizon Communications provides local telephone services in over thirty states, this action concerns the provision of such service in the area serviced by Bell Atlantic before its merger with GTE Corporation, including in the period after the merger.

19. In order to provide a competitive level of local phone service in the Geographic Market without having to make the significant financial and time-consuming commitment that the creation of a separate local loop requires, CLECs must have access to Bell Atlantic's local loop. A local loop is the wireline—a twisted pair of copper wires, coaxial cable, fiber optic cable, or the like—that links the customer's premises to a central switching station. Telephone calls are then directed from the central switching station to their destinations. CLECs gain access to Bell Atlantic's local loop through the entry of resale agreements with Bell Atlantic pursuant to which, *inter alia*, Bell Atlantic obligates itself to provide access and service for the CLEC's customers on the same terms as are provided for Bell Atlantic's own local phone service customers.

20. The alternative means of entering the local phone service market are for a CLEC to build its own local loop, in which case it still must interconnect with Bell Atlantic's phone network or for a CLEC to build some, but not all, of its own facilities. That such a commitment is required is a barrier to entry into the market for providing local phone service in the Geographic Market. Resale agreements are an easier, cheaper means of entering the local phone service market in the Geographic Market.

21. Throughout the Class Period, Bell Atlantic has not afforded CLECs access to the local loop on a par with its own access. Among other things, Bell Atlantic has filled orders of CLEC customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with Bell Atlantic.

22. On March 9, 2000, after Plaintiff retained counsel to investigate and pursue its claim, Bell Atlantic agreed to pay a $3 million fine to the U.S. Treasury pursuant to a consent decree entered into between Bell Atlantic and the Federal Communications Commission arising out of Bell Atlantic's failure to provide adequate access to Local Phone Service competitors in New York to the level required when the Federal Communications Commission allowed Bell Atlantic to offer long-distance telephone service to New Yorkers and to pay $10 million in compensation to competing Local Phone Service providers in New York for injury caused to them as a result of Bell Atlantic's misconduct in handling orders from such competing Local Phone Service providers.

23. Plaintiff has obtained local phone service in the Geographic Market from AT&T, which is a CLEC, i.e., a carrier other than Bell Atlantic, and has suffered injury to its business as a result of the conduct of Bell Atlantic complained of herein.

24. Plaintiff's local phone service requires access to and the provision by Bell Atlantic of services on Bell Atlantic's local loop, as does the local phone service of Plaintiff's fellow Class members. Such access and the provision of such services is arranged by its CLEC, which has entered into an agreement with Bell Atlantic pursuant to which Bell Atlantic is obligated to afford the CLEC access to and services on the local loop on the same terms as are afforded to its (Bell Atlantic's) own local phone service customers. In each such case, the CLEC acts as the agent for its customers (including Plaintiff and the other members of the Class) in arranging with Bell Atlantic for such access or the provision of such services.

25. Plaintiff and the other members of the Class use Bell Atlantic's local loop when they obtain local phone service from their CLECs.

INTERSTATE TRADE AND COMMERCE

26. The conduct of Bell Atlantic described in this Complaint was in, and has affected, interstate trade and commerce. In 1998, Bell Atlantic's annual revenues were just under $3 billion.

27. The activities of Bell Atlantic, as described herein, were within the flow of, and substantially affected, interstate commerce.

CLASS ACTION ALLEGATIONS

28. Plaintiff brings this action on its own behalf and as a class action pursuant to rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of all those who were customers of a company other than Bell Atlantic with respect to the provision of Local Phone Service in the Geographic Market at any time since March 10, 1996 and who were damaged by the conduct complained of herein (the "Class"). As used herein, "Local Phone Service" means the provision of non-wireless local telephone services.

29. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of members of the Class can only be determined by appropriate discovery, the Class members number in the thousands.

30. Plaintiff's claims are typical of the claims of the other members of the Class. Plaintiff and all other members of the Class sustained damage to their business and property interests as a result of the wrongful conduct complained of herein.

31. Plaintiff will fairly and adequately protect the interests of the other members of the Class, and have retained counsel competent and experienced in class action and antitrust litigation.

32. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for Class members individually to seek redress for the wrongful conduct alleged herein.

33. Common questions of law and fact exist as to all members of the Class, and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether Bell Atlantic has engaged in unjust or unreasonable discrimination in the provision of access to and services related to its local loop against Plaintiff and the other members of the Class;

(b) whether Bell Atlantic engaged in anticompetitive conduct that has a dangerous probability of allowing it to acquire or maintain a monopoly in the Local Phone Service market in the Geographic Market; and

(c) whether Bell Atlantic has improperly interfered with the contracts for the provision of Local Phone Service entered into between Plaintiff and the other members of the Class and their respective non-Bell Atlantic Local Phone Service provider (CLEC).

34. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

35. The names and addresses of the members of the Class can be obtained from the Bell Atlantic competitors that provided Local Phone Service to them. Notice can be provided to such Class members using techniques and a form of notice similar to those customarily used in class actions.

AS AND FOR A FIRST CLAIM FOR RELIEF
For Damages
Section 202 of Federal Communications Act of 1934

36. Plaintiff repeats and realleges the allegations of paragraphs 1 through 35 as if fully set forth in this paragraph.

37. Section 202(a) of the FCA provides that:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a).

38. Bell Atlantic is a "common carrier" within the meaning of section 202(a) of the FCA.

39. Plaintiff and each other member of the Class has a direct relationship with Bell Atlantic regarding Bell Atlantic's local loop because each uses that local loop whenever they use the local phone service provided by their CLEC.

40. In addition, the structure of the Local Phone Service market is such that in connection with the ordering of services from Bell Atlantic by a CLEC for its, the CLEC's, customers, the CLEC is acting as agent of the customers in such a manner that the CLEC and its customers are not distinct economic entities in dealing with the services being rendered by Bell Atlantic and, accordingly, the CLEC's customers, including Plaintiff and the other members of the Class, have a sufficiently direct relationship with Bell Atlantic to permit

their assertion of a claim pursuant to section 202(a) of the FCA.

41. Bell Atlantic's conduct complained of herein has violated section 202(a) of the FCA in that Bell Atlantic has engaged in and continues to engage in unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by a means or device, has made or given undue or unreasonable preference or advantage to another class of persons, and has subjected a class of persons to undue or unreasonable prejudice or disadvantage.

42. The class of persons discriminated against are the customers of Bell Atlantic's competitors, including Plaintiff and the other members of the Class. Plaintiff and the other members of the Class have a sufficiently direct relationship with Bell Atlantic as a result of the agency relationship that exists between them and their respective CLECs to permit them to assert this claim.

43. Because it is a "common carrier," under section 207 of the FCA Bell Atlantic is liable to Plaintiff and the other members of the Class who have been damaged by Bell Atlantic's violation of section 202 of the FCA in an amount to be determined at trial.

44. Plaintiff and the other members of the Class have not asserted the claims set forth in this Complaint that arise under section 202 of the FCA before the Federal Communications Commission.

AS AND FOR A SECOND
CLAIM FOR RELIEF
For Damages and Injunctive Relief
for Attempted Monopolization
Section 2 of the Sherman Act

45. Plaintiff repeats and realleges the allegations of paragraphs 1 through 35 as if fully set forth in this paragraph.

46. The relevant product market for purposes of analyzing the effects of the conduct in this case under section 2 of the Sherman Act is the Local Phone Service market defined herein.

47. The geographic market for purposes of analyzing the effects of the conduct in this case under section 2 of the Sherman Act is the Geographic Market defined herein.

48. Within the Geographic Market, Bell Atlantic has a monopoly with respect to local loops that existed in 1996. While there are some smaller companies within the Geographic Market that provided local loops and local switches before 1996, they tended to be small local telephone companies serving areas, often rural, that were not deemed attractive enough for pre-breakup AT&T.

49. Bell Atlantic provides Local Phone Service in the Geographic Market and has done so, including through its predecessors, since the break-up of AT&T.

50. According to an October 1999 article in FORBES MAGAZINE, Bell Atlantic had a 96% share of the Local Phone Service market in the Geographic Market at the time. The New York State Public Service Commission disclosed that Bell Atlantic had 82% of the local exchanges in New York as of December 31, 1999, and testimony before a committee of the New Jersey State Senate asserted that Bell Atlantic had 98% of the local exchanges in that state. In December 2000, Verizon stated that it had 89% of the local phone service market in Massachusetts.

51. The barriers to entry in the provision of Local Phone Service are high. Particularly in the Geographic Market, where most premises are in long-standing structures, it is expensive and requires large capital outlays for a potential market entrant to duplicate the existing local loops directly to its own customers. The alternative is to create new facilities, which is both expensive and time-consuming.

52. Bell Atlantic has engaged in exclusionary and anticompetitive behavior by, *inter alia*, attempting to exclude or reduce the market share of rivals in the Local Phone Service on a basis other than efficiency, i.e., by making it difficult for its competitors to provide service in the Local Phone Service market on the level that Bell Atlantic is able to provide to its customers in that market. This conduct has had an impact on consumers and has impaired competition in the Local Phone Service in an unnecessarily restrictive way.

53. In particular, Bell Atlantic's conduct complained of herein has increased the barriers to entry into the Local Phone Service market in the Geographic Market, has retarded the development of competition within the Local Phone Service market in the Geographic Market, and has weakened the ability of competitors to compete in the Local Phone Service market within the Geographic Market.

54. Bell Atlantic had agreements with Plaintiff's CLEC as well as with the CLECs of the other members of the Class to provide access to and services for Bell Atlantic's local loop on nondiscriminatory terms. The access and level of services that Bell Atlantic in fact provided to Plaintiff's CLEC and to the CLECs of the other members of the Class was not substantially the same as Bell Atlantic provided for itself for its own Local Phone Service customers. The plain effect of this conduct is that Plaintiff's CLEC and the CLECs of the other members of the Class were prevented from offering Local Phone Service of the quality as was offered by Bell

Atlantic to its own Local Phone Service customers and thereby to impede the ability of those CLECs to enter and to compete with Bell Atlantic in the Local Phone Service in the Geographic Market. This conduct is continuing.

55. By entering into resale agreements with CLECs, Bell Atlantic induced CLECs to attempt to enter into the Local Phone Service market in the Geographic Market through resale agreements as opposed to erecting their own facilities, inducing them to attempt to compete with Bell Atlantic in the Local Phone Service market in the Geographic Market through the use of such agreements and into enrolling customers, including Plaintiff and the other members of the Class, as Local Phone Service customers. Bell Atlantic failed to fulfill its obligations under those agreements.

56. The anticompetitive conduct of Bell Atlantic complained of herein had and has a dangerous probability of preventing CLECs from establishing significant positions in the Local Phone Service in the Geographic Market, which establishment would dilute Bell Atlantic's market power in the Local Phone Service in the Geographic Market, and therefore of allowing Bell Atlantic to acquire a monopoly in that market.

57. There is no valid business reason for Bell Atlantic's behavior with respect to providing access to its local loop. This conduct has directly and adversely impacted upon the ability of consumers, including Plaintiff and the other members of the Class, to obtain satisfactory Local Phone Service. It has also caused substantial injury to competitors with Bell Atlantic in the provision of service in the Geographic Market.

58. The aforementioned conduct was anticompetitive conduct and made with a specific intent to attempt to acquire a, or maintain its, monopoly in the Local Phone Service market within the Geographic Market or to maintain the monopoly that it holds in that market.

59. As a result of the foregoing, Bell Atlantic have violated section 2 of the Sherman Act and Plaintiff and the other members of the Class have been injured in their business and property interests by that violation in an amount to be determined at trial.

60. Bell Atlantic's unlawful conduct is continuing and unless equitable relief is granted competition in the Local Phone Service in the Geographic Market will be substantially and improperly adversely impacted.

61. Plaintiff and the other members of the Class have no adequate remedy at law.

AS AND FOR A THIRD
CLAIM FOR RELIEF
For Damages
Tortious Interference with Contract

62. Plaintiff repeats and realleges the allegations of paragraphs 1 through 35 as if fully set forth in this paragraph.

63. Plaintiff and the other members of the Class had valid contracts with companies other than Bell Atlantic for the provision of Local Phone Service within the Geographic Market.

64. Bell Atlantic had knowledge of each of those contracts.

65. Insofar as the CLECs with which Plaintiff and the other members of the Class had contracts for the provision of Local Phone Service within the Geographic Market were unable to provide satisfactory service to those customers and therefor breached their contracts with those customers as a result of Bell Atlantic's conduct complained of in this Complaint, Bell Atlantic intentionally procured the breaches of those contracts.

66. Plaintiff and the other members of the Class have been damaged as a result of the breaches by their respective CLECs.

67. By reason of the foregoing, Bell Atlantic is liable to Plaintiff and the other members of the Class for having intentionally interfered with their contracts with their respective CLECs in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of itself and the other members of the Class, prays for judgment as follows:

(i) Entering an order certifying this action as a proper class action pursuant to rule 23(b) of the Federal Rules of Civil Procedure on behalf of the Class defined in paragraph 28 hereof, certifying Plaintiff as an adequate representative of that Class, and certifying Plaintiff's counsel as counsel to the Class;

(ii) Adjudging that Bell Atlantic has violated the Federal Communications Act of 1934, the Sherman Antitrust Act of 1890, and the common law;

(iii) Awarding judgment against Bell Atlantic in an amount to be determined at trial for its violations of the Federal Communications Act of 1934 and the common law for damages suffered by Plaintiff and the other members of the Class as a result of these violations;

(iv) Awarding judgment against Bell Atlantic in an amount to be determined at trial for its violations of Sherman Antitrust Act of 1890 for the damage to the business and property interests suffered by Plaintiff and the other members of the Class as a result of Bell Atlantic's violations, to be trebled according to law, plus attorney's fees, costs, and interest as allowable by law;

(v) Preliminarily and permanently enjoining Bell Atlantic from providing access to the local loop market in the Geographic Market to providers of Local Phone

Service other than itself on terms and conditions that are not as favorable as those enjoyed by Bell Atlantic;

(vi) Awarding attorney's fees and costs in this action; and

(vii) Granting such other relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues triable by jury.

Dated: New York, New York
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Supreme Court, U.S.
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No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

The Court granted certiorari on the following question: Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?

RULE 29.6 STATEMENT

Verizon Communications Inc., is the successor corporation of Bell Atlantic Corp., named as defendant and appellee below. Verizon has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' amended opinion (Pet. App. 1a-48a) is reported at 305 F.3d 89, with the partial dissent reported at 294 F.3d 307, 330-35. The district court's initial opinion (Pet. App. 49a-61a) is reported at 123 F. Supp. 2d 738. The district court's second opinion (Pet. App. 62a-68a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2002. The court amended its opinion and denied rehearing on October 1, 2002. Pet. App. 69a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant antitrust provisions, 15 U.S.C. §§ 2, 15, and provisions of the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, amended by the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, are printed at Pet. App. 70a-103a.

STATEMENT

Respondent alleges deficiencies in Verizon's provision of the novel price-discounted assistance the 1996 Act requires Verizon to furnish rivals. The Second Circuit extended Section 2 precedent to cover that claim. In doing so, it ignored the normal requirements for antitrust condemnation of unilateral conduct, particularly those limiting duties to help rivals, and imposed on antitrust judges and juries tasks traditionally and properly reserved to regulators. This Court should reject the Section 2 expansion that respondent requires to sustain its claim, particularly in light of the 1996 Act's comprehensive regulatory regime. The Court should also

reaffirm traditional statutory standing limits that bar respondent, an indirect purchaser, from suing for injury derivative of harm to the direct customer.

A. Statutory Background

This case arises against the background of 47 U.S.C. §§ 251-253, added by the 1996 Act and described in *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 476, 491-94 (2002), and *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999). Those provisions ended all legal barriers to entry into local telecommunications markets, § 253, and required all carriers (new and old) physically to "interconnect," so that customers reached by one carrier's facilities can communicate with customers served by all other carriers, § 251(a). But the 1996 Act did not stop there: it also required incumbents to share their facilities and services at specially discounted rates with rivals.

These latter provisions created "something brand new"–"the wholesale market for leasing network elements" (*Verizon*, 535 U.S. at 528)–by directing the incumbents, for the first time, to assist new intermediaries to displace them, line by line, in providing local service to local customers over the incumbents' own networks. This assistance, as implemented, must be rendered at heavily discounted prices designed "to give aspiring competitors every possible incentive to enter local retail telephone markets." *Id.* at 489. Congress recognized this forced change in the incumbents' businesses to be "'extraordinary'" precisely because incumbents were being ordered to help "'competitors come in and try to beat your economic brains out.'" *Id.* at 488 (quoting 141 Cong. Rec. 15572 (1995) (Sen. Breaux)); *see id.* (the 1996 Act duties aim "to achieve *the entirely new objective of uprooting the monopolies* that traditional rate-based methods had perpetuated") (emphasis added).

Thus, the Act newly requires incumbents to turn over pieces of their networks ("unbundled network elements," or UNEs) at discounted government-set rates based on "cost." §§ 251(c)(3), (d)(1), (d)(2). Incumbents also must allow rivals to set up their equipment in the buildings that house the incumbents' switches and wire centers ("collocation"). § 251(c)(6). And incumbents must sell rivals their retail services, at yet another discounted rate, so that rivals can resell those services as mere marketers and middlemen. §§ 251(c)(4), 252(d)(3). These provisions force incumbents into an altogether new role as price-discounted wholesalers, uprooting themselves as retailers in favor of new rivals using the incumbents' own facilities and services.

The 1996 Act relies on two levels of expert regulators, federal and state, to implement and enforce these obligations. *First*: The FCC has issued, and repeatedly updated, massive orders creating an unparalleled regime prescribing what network elements and services rivals are entitled to demand, how and when such demands must be met, and how much incumbents may charge for dozens of different network elements and services in hundreds of discrete geographic markets. *See* United States Telecom Ass'n *Amicus* Brief. For example, the FCC has granted rivals rights to use the incumbents' buildings, loops, trunks, switches, and computerized ordering, billing, and other "operation support systems."[1] For rented loops (the wire to the home or business), the rival acquires "exclusive control."[2] Rates for network-element

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[1] This Court reversed the FCC's first ruling on rentable network elements in *Iowa Utilities*, 525 U.S. at 388-92. The FCC's second ruling was reversed in *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424, 427 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003) ("too broad" a sharing duty can deter *independent* investment).

[2] First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCCR 15,499, ¶ 385 (1996).

rental are set by a "novel ratesetting" methodology, which prescribes low rates just "short of confiscating the incumbents' property," including rates based on "most efficient" and "lowest cost" technologies. *Verizon*, 535 U.S. at 489; *id.* at 467.[3]

Second: Within the federal standards, the Act assigns implementation responsibilities to state regulators, with the FCC as backup. Under the statutory regime of negotiated agreements and forced arbitration, (a) every term of incumbent-rival relations is approved in advance by regulators and (b) any rival disappointed in its request for assistance is guaranteed a prompt regulatory decision, itself reviewable in court. Every term of dealing is either agreed to by the rival or imposed by regulators subject to judicial review. § 252(b), (c), (e)(1)-(5). The Act also guarantees nondiscrimination among rivals by making any agreement's terms available to all rivals. § 252(i).

Third: These comprehensive agreements, once entered, can be enforced by the regulators. And, if either the parties or the regulators believe it advisable, the agreements can provide for expedited nonjudicial enforcement mechanisms.[4]

Fourth: The FCC, aided by state regulators and the Justice Department, enforces the assistance duties, and prescribes still more duties, as a condition for allowing the largest incumbents (the Bell companies) to enter, and remain in, the

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[3] Concrete rate setting is done by state regulators applying to specific companies the methodology prescribed by the FCC. *See* § 252(e)(4), (6); *Verizon*, 535 U.S. at 492-93, 524.

[4] *See BellSouth Telecommunications Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1275-78 (11th Cir. 2003) (*en banc*) (uniform recognition in other circuits); *Bell Atlantic-Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304-05 (4th Cir. 2001), *vacated on other grounds*, 535 U.S. 635 (2002); *Starpower Communications*, 15 FCCR 11277, 11280, ¶ 7 (2000) (FCC recognizing state agency enforcement authority).

long-distance market. 47 U.S.C. § 271. Through detailed "performance assurance plans," the regulators have meticulously monitored and enforced the incumbents' rendering of the required assistance. Verizon has met these Section 271 requirements in every State it serves.[5]

In response to these mandates, incumbents like Verizon have signed thousands of comprehensive agreements to share facilities with their rivals. *See Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 2003 WL 21153305 (4th Cir. May 20, 2003), at *8; www.dps.state.ny.us/Interconnection_Agreements.htm (New York agreements). They have spent billions of dollars re-configuring their facilities, developing new computer systems, and deploying personnel to enable rivals to place and confirm vast numbers of orders for network elements or wholesale services to displace the incumbents' service of customers. As of June 2002, the incumbents had lost 22 million lines (11.4%) to competitors. In New York, where this case originated, the figure was 3.2 million lines (25%). *See* FCC, *Local Telephone Competition: Status as of June 30, 2002*, tables 6, 8 (Dec. 9, 2002), http://ftp.fcc.gov/Bureaus/Common_Carrier/Reports/FCCState_Link/IAD/lcom1202.pdf.

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[5] Verizon was the first incumbent to satisfy Section 271–for New York, in late 1999 (*AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000))–and now has long-distance authorization for all of its lines. *See Application of Verizon Maryland Inc.*, 2003 WL 1339419 (Mar. 19, 2003) (Maryland, West Virginia, and D.C.). For the other FCC approvals, see 17 FCCR 21880 (2002) (Virginia); 17 FCCR 18660 (2002) (New Hampshire, Delaware); 17 FCCR 12275 (2002) (New Jersey); 17 FCCR 11659 (2002) (Maine); 17 FCCR 7625 (2002) (Vermont); 17 FCCR 3300 (2002) (Rhode Island); 16 FCCR 17419 (2001) (Pennsylvania); 16 FCCR 14147 (2001) (Connecticut); 16 FCCR 8988 (2001) (Massachusetts); 15 FCCR 3953 (2000) (New York). The *Verizon Maryland* order, among others, lays out, in appendices, the exacting requirements for long-distance approval, including numerous Section 251 duties, and the performance measures to which the Bell companies are held.

B. Verizon-AT&T Transactions

In 1997, AT&T and Verizon entered into an agreement approved by the New York Public Service Commission (PSC) under the 1996 Act. The agreement details the discounted services, facilities, and network elements that Verizon must furnish AT&T.[6] And it provides for resolution of "disputes through arbitration and the administrative process" as the "'exclusive remedy for all disputes between [Verizon] and AT&T arising out of this Agreement or its breach.'" Pet. App. 5a, 38a n.19.

Respondent, a New York City law firm, bought local telephone service from AT&T. It had no relationship with Verizon. Pet. App. 1a, 5a. Respondent described the AT&T service as "resold" service physically furnished by Verizon.[7]

In December 1999, Verizon encountered a problem in new software used to confirm to rivals that Verizon had indeed fulfilled the orders they had placed. AT&T complained to regulators, and within three months, on March 9, 2000, Verizon entered a consent decree with the FCC "to resolve the problem promptly and pay $3 million to the United States and $10 million to AT&T and other competitors." Pet. App. 5a. By July 2000, the software bug having long been fixed, the decree was dissolved. *Id.*[8] Thus,

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[6] *See* Order Approving Interconnection Agreement, 1997 WL 410707 (NY PSC No. 96-C-0723), at *41, *47, *56-57.

[7] *See* CA Trinko Br. 39-40 ("resale agreement"). Economically, AT&T was a reseller of service physically being furnished by Verizon whether it was purchasing Verizon "service" at a wholesale price for "resale" or, instead, the end-to-end package of Verizon-assembled piece parts ("UNE platform"). The price differs, but not the reality that Verizon is physically furnishing the service. *Iowa Utilities*, 525 U.S. at 393-95.

[8] *See* Memorandum Opinion and Order, *Application of Verizon New England*, 16 FCCR 8988, 9034-35, ¶ 87 (2001) (summarizing events); Order, *Bell Atlantic-New York Authorization*, 15 FCCR 5413 (2000) (consent decree). The New York PSC also addressed the problem. Order

the only problem concretely mentioned by respondent was efficiently resolved. Pet. App. 24a.

C. This Litigation

1. One day after entry of the March 9 consent decree, respondent brought this consumer class action against Verizon, on behalf of all customers of Verizon's competitors since 1996. Respondent broadly complained that it had "received poor local phone service" from AT&T and that Verizon, with "no valid business reason," had treated competitors' orders for special discounted service worse than it treated orders for retail service from its own customers. Pet. App. 6a-7a. Aside from noting the just-entered consent decree, the complaint (and amended complaint) contained no specifics, but generally alleged deficient terms of service to competitors. *Id.* at 7a; *see* JA 12-50.

Respondent alleged that the deficiencies in Verizon's assistance to AT&T amounted to violations of Section 2 of the Sherman Act, warranting treble damages and injunctive relief. Pet. App. 6a.[9] The district court dismissed. Section 2 requires both monopoly power (actual or dangerously probable) and "anticompetitive" ("predatory," "exclusionary") conduct. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480 (1992). The district court followed

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Addressing OSS Issues, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 1531916 (NY PSC Nos. 00-C-0008 *et al.*); Order Directing Market Adjustments and Amending Performance Assurance Plan, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 517633 (NY PSC Nos. 00-C-0008 *et al.*); Order Directing Improvements to Wholesale Service Performance, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 363378 (NY PSC Nos. 00-C-0008 *et al.*). The New York Attorney General received daily reports of Verizon's performance following correction of the problem.

[9] Respondent also alleged violations of the Communications Act, 47 U.S.C. §§ 202(a), 251. The Second Circuit allowed the Section 202(a) claim to proceed. Certiorari was limited to the antitrust claim.

Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) (Diane Wood, J.), in concluding that the conduct element was not satisfied by respondent's allegations of deficient assistance to rivals. Pet. App. 55a-56a; *see id.* at 63a, 66a-67a (dismissing amended complaint).

2. Respondent appealed the dismissal of its claims for damages, and the court of appeals reinstated the Section 2 claim. Pet. App. 16a-25a. The court ruled that, even though the only asserted injury was receipt of "poor local phone service" from AT&T, respondent had statutory standing to complain that AT&T had received poor treatment from Verizon. *Id.* at 26a. Although the indirect-purchaser injury was derivative of injury to AT&T, the court relied on the fact that AT&T was not "solely" a customer of Verizon, but "also a competitor," and on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Pet. App. 26a-27a.

On the merits, the Second Circuit did not point to this Court's precedents as identifying actionable Section 2 conduct that covered respondent's claim. Rather, it relied on "essential facilities" and "monopoly leveraging" theories as articulated by various appellate courts. Pet. App. 28a-30a. Thus, the court held: "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete in a given market." *Id.* at 29a, 29a-30a. The court also found sufficient the allegations that Verizon (a) has monopoly power in "a wholesale market in which it sells access to the local loop" (albeit under legal compulsion) and (b) "*used that power to gain a competitive advantage* in a retail market in which telecommunications carriers sell local phone service to consumers." *Id.* at 30a (emphasis added).

The Second Circuit recognized that, "[i]n *Goldwasser*, the Seventh Circuit dismissed similar allegations." Pet. App. 31a. But in discussing *Goldwasser*, the Second Circuit

reasoned only that the 1996 Act did not override what were, in the court's view, established theories of Section 2 liability. *Id.* at 31a-33a. It did not discuss *Goldwasser*'s ruling that the "unadorned" Sherman Act, of its own force, does not impose duties to assist rivals in the ways alleged by respondent and the *Goldwasser* plaintiffs (222 F.3d at 399-400).

Nor did the Second Circuit discuss the relevance of the applicable regulatory regime to any attempt to define new Section 2 duties. The court noted that *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), shows that some antitrust claims can co-exist with some regulatory regimes. But it did not compare the particulars of the 1996 Act, which include a plain-on-its-face guarantee of an advance, reviewable regulatory ruling on all access demands, with the regulatory regime in the background of *Otter Tail*, which provided no remotely comparable substantive sharing rights or procedural remedy. Pet. App. 34a-35a. Although this case concerns the threshold question of whether any wrong is an *antitrust* wrong, the Second Circuit pervasively stressed the importance of "affording the consumer compensation that the Telecommunications Act does not provide." Pet. App. 33a; *see id.* at 35a, 36a, 37a n.18.

INTRODUCTION AND SUMMARY OF ARGUMENT

The extraordinary duties of affirmative assistance to rivals created by the 1996 Act, with all their complexity and uncertain economic experimentation, are fully enforceable through the 1996 Act regime. Such duties, however, have never been part of Section 2 of the Sherman Act, and they should not now become so, enforceable through treble-damages litigation with nonexpert juries and judges determining the "reasonable" price and terms of discounted "access." The novel demand to wield that *in terrorem* weapon and to turn antitrust courts into regulatory agencies should be rejected as bad antitrust law in general and

particularly unnecessary and inadvisable in the face of the 1996 Act.

We begin with this Court's precedents, which do not encompass respondent's claim. We then explain why multiple antitrust principles reflected in those precedents preclude expansion of Section 2 duties to reach respondent's claim. We then show that the two non-Supreme-Court theories of Section 2 liability that the Second Circuit relied on–essential facilities and monopoly leveraging–cannot support a contrary result. Finally, we describe the statutory-standing limits that bar suits by indirect purchasers like respondent.

I. A. Respondent's claim falls outside this Court's most pertinent precedents, addressing duties to deal. Those decisions have found liability *only* where the defendant refused a rival the very thing, on the very terms, defendant was already voluntarily providing non-competitor customers (or, indeed, had voluntarily been providing the rival itself). *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Only that circumstance presents a prima facie reason to question whether refusing to deal with the competitor makes any business sense apart from enabling monopoly; only such a facially aberrant refusal has triggered a demand for justification; and only in such a case can the court focus on a simple disparity in treatment of would-be customers (rather than determining the proper terms of dealing afresh). *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (Posner, J.).

This essential circumstance of *discrimination among outsiders as would-be customers seeking the same good at the same price* is not present in this case. There is, and could be, no allegation that Verizon was voluntarily providing non-competing customers the special price-discounted wholesale services it now extends to AT&T and other rivals under the 1996 Act. Respondent's claim thus goes beyond this Court's Section 2 precedents.

B. Respondent's proposed expansion of Section 2 cannot be squared with a basic Section 2 principle—that unilateral conduct is lawful as long as it makes business sense *apart from* enabling monopoly returns. SG Pet. Br. 11-16. This principle is affirmed in this Court's refusal-to-deal cases and gives objective definition to what constitutes a "valid business reason[]." *Aspen*, 472 U.S. at 605; *Kodak*, 504 U.S. at 483. It limits illegality to conduct that *only* a would-be monopolist would pursue–conduct necessarily tied to gaining or extending monopoly power–thus performing the essential task of sifting out impermissible conduct from the intentionally rival-harming conduct that *is* competition.

Respondent does not and could not allege that this requirement is met by Verizon's alleged deficiencies in complying with the 1996 Act's affirmative-assistance mandates. The Act requires Verizon to displace its own full-priced sales by sharing its facilities and services with rivals at specially discounted prices, and to assume the massive costs of creating and maintaining this system of dealing with new intermediaries. It is taking on, not failing in, this role that would be contrary to any business's normal interests.

C. Respondent's claim should be rejected for an additional reason: its character as a claim for novel unilateral affirmative assistance to rivals. Such a claim presents distinctive problems that are deeply unsuited to antitrust resolution. Forced sharing dampens incentives to invest–for incumbents who have to share the rewards of often risky investments, and for competitors whose independent investments in new facilities become riskier (and perhaps costlier) than sharing. Forced sharing also creates high costs of implementation, requiring an apparatus for setting and monitoring terms. But courts cannot reliably and continuously calibrate the "right" level of sharing, or reliably ensure that a regime of rivalry dependent on sharing is a net positive for consumer welfare. This uncertain task is inherently one

of experimentation for regulators, not judges and juries in costly (class action) treble-damages litigation. Indeed, in a technologically fast-evolving market, frequent revisiting of assistance duties is needed to lower the ever-present risk that the costs of intervention will outweigh the benefits.

Because any determination of net benefits would depend on the terms of sharing, an unavoidable task inherent in respondent's claim–even in establishing *liability*–is the assessment of "reasonable" prices and other terms. Antitrust law, however, has rigorously (if not absolutely) foresworn that task as unsuitable for federal judges and juries, which lack the expertise and flexibility of regulators. Proper prices, moreover, would have to be set independently of the 1996 Act determinations: the Act's savings clause leaves antitrust duties where the Act found them; and *antitrust* principles would not impose the prices–or other terms–adopted under the 1996 Act to serve the new goal of uprooting monopolies and jump-starting entry. This is a regulatory task, not one for antitrust judges and juries. *See Cavalier, supra.*

D. The presence of the 1996 Act regime adds special reason not to transform federal courts into shadow regulators by expanding Section 2 duties as respondent proposes. The 1996 Act, on its face, guarantees prompt judicially reviewable agency action on all demands for affirmative assistance from rival phone companies. No prior regulatory regime was comparable. *Compare Otter Tail, supra.* Any genuine obstacle to competition will escape redress under that regime only if both the agencies and the reviewing courts systematically fail to discern it–in which case there is no *less* basis for expecting systematic failure (of the same courts) under respondent's new antitrust duty (where errors are less easily corrected). Adopting respondent's novel antitrust duty, therefore, would add no significant protection of competition to the 1996 Act regime. *See Goldwasser, supra*; *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990)

(Breyer, J.). To the contrary, it would threaten that regime by deterring the negotiation of sharing agreements and limiting the agencies' flexibility to strike balances and change them as circumstances evolve. With comprehensive regulatory superintendence already in place, this is the last sensible setting in which to expand Section 2 to make federal judges and juries into regulators.

E. "Essential facilities" and "monopoly leveraging" theories cannot alter the result here. Neither theory is a Section 2 standard approved by this Court, and all the reasons for refusing to expand *this* Court's Section 2 duties are also reasons for limiting any lower-court doctrine this Court might in some other case adopt. In any event, the circuit courts' "essential facilities" doctrine itself has not supported liability for breach of duties like those at issue here. In the truly exceptional case of actual essential-facilities liability for unilateral action, *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), the claim most like respondent's was rejected, and the claim resulting in liability involved circumstances far more like *Aspen*: in particular, AT&T was voluntarily in the business of offering others the very service MCI demanded. Respondent's claim would thus require an extension of even the lower courts' "essential facilities" precedents, which could not be justified. As for "monopoly leveraging," adopting that theory would simply violate Section 2 and this Court's precedents. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

II. Even if the conduct alleged here is actionable under Section 2, respondent should be denied statutory standing to bring the claim. Respondent is an indirect purchaser asserting injury only as an indirect result of injury to the direct victim. Respondent's claim thus fails to meet the basic statutory requirement of direct injury. *See Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258 (1992); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990). Underlying

policy considerations bolster that conclusion. In particular, allowing suits like respondent's would, by vastly raising the stakes, impair the goal of expeditious resolution of disputes between the incumbent and its rival, a goal reflected in the exclusive nonjudicial dispute resolution mechanism of the Verizon-AT&T agreement approved by regulators under the 1996 Act.

ARGUMENT

This Court should reject respondent's claim as not stating a valid Section 2 claim: the claim is novel and would be bad antitrust law, especially in light of the 1996 Act. The Court should initially decide that substantive issue, which divides the circuits and is presented in numerous suits brought by competitors, direct purchasers, and indirect purchasers. The separate question whether respondent in particular can sue–a matter of statutory standing or, equivalently, the reach of the statutory cause of action or "right to sue" (*Holmes*, 503 U.S. at 264)–is not an issue of subject matter jurisdiction and so, unlike constitutional standing (which unquestionably exists here), need not be addressed before deciding the scope of the antitrust duty. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 97 & n.2 (1998); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 456 (1974). This second issue, however, provides an independent ground requiring dismissal of respondent's antitrust claim.

I. RESPONDENT ALLEGES NO COGNIZABLE SECTION 2 VIOLATION

Respondent's claim confronts fundamental limits on Section 2. Most basically, acquiring or continuing a monopoly is not unlawful; Section 2 condemns only limited types of unilateral conduct for doing so.[10] A firm that has lawfully

[10] *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920) (Section 2 "does not compel competition"); *Kodak*, 504 U.S. at 480 (power plus *conduct*); *Aspen*, 472 U.S. at 596 n.19; *see United States v. Microsoft Corp.*, 253 F.3d 34, 51, 58 (D.C. Cir. 2001) (*en banc*) ("merely possessing monopoly power is not itself an antitrust violation"; "having a monopoly does not by itself violate § 2"; "'the successful competitor, having been urged to compete, must not be turned on when he wins,'" quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (per L. Hand, J.)).

[11] *Aspen*, 472 U.S. at 600 (quoting *United States v. Citizens & Southern Nat'l Bk.*, 422 U.S. 86, 116 (1975)).

[12] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69 (1984) ("The Sherman Act contains a 'basic distinction between concerted and independent action.' *** Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. *** Concerted activity inherently is fraught with anticompetitive risk."); *see* 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 772d at 192-93 (2d ed. 2002).

obtained monopoly power thus need not dismantle its monopoly by subjecting itself to a process of creeping divestiture, shedding its customers one at a time by meeting every would-be rival's demand to buy its facilities or services at wholesale rates. *See Cavalier*, at *11 ("if a company such as Verizon, which was a longstanding legal monopoly, were asked to share its office space and to rent its telephone lines and other facilities to a competitor when it was not already in the business of renting office space, lines, or facilities, it could have legally refused the request to expand into such a business without violating § 2").

The "'central message of the Sherman Act'" is, instead, that all firms, including new entrants, "'must find new customers and higher profits through internal expansion–that is, by competing successfully rather than by arranging treaties with its competitors.'"[11] The Sherman Act promotes independent, unilateral rivalry; it treats cooperation among competitors with suspicion.[12] For a century, the Act has

overwhelmingly focused on *negative* duties (to avoid acts that hinder rivals' independent efforts to attract customers) and not *affirmative* ones.[13]

Respondent's claim, asserting a duty to give rivals adequate price-discounted affirmative assistance through sharing facilities and services, thus seeks to define an exceptional class of unlawful Section 2 conduct. This claim is unprecedented. And there are compelling reasons for not expanding Section 2 to embrace it.

A relevant analytic framework is laid out in *Town of Concord*, where the court applied "[t]raditional antitrust principles" in two steps: *first*, it explained why, regulation aside, relevant antitrust principles and policies, including workability and predictability requirements and institutional considerations, weighed against recognizing the claim at issue (915 F.2d at 21-25); *second*, it explained why that conclusion was cemented, as a matter of antitrust law itself, by the presence of regulation (915 F.2d at 21, 25-29). In *Goldwasser*, the opinion by Judge Diane Wood (antitrust law professor and former Antitrust Division official) followed a

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[13] *See Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir. 1991) (negative/affirmative line); *Olympia Equip.*, 797 F.2d at 375-76 ("'There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.'"); S. Breyer, *Regulation and Its Reform* 157 (1982) (antitrust laws "act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do.").

The distinction between acts negatively interfering with others, on one hand, and a failure to lend affirmative assistance, on the other, is fundamental elsewhere in the law. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (relying on same line to hold that failure to provide assistance is not "deprivation" under Due Process Clause).

similar course to reject claims like respondent's. The asserted duties, the court explained, are "precisely the kinds of affirmative duties to help one's competitors that *** do not exist under the unadorned antitrust laws." *Id.* at 400. The court then added that the 1996 Act furnished an especially strong reason for refusing to expand Section 2 duties: the "antitrust laws would add nothing to the oversight already available under the 1996 law," and adding antitrust duties would impair the "elaborate system of negotiated agreements and enforcement established by the 1996 Act." *Id.* at 401. The Fourth Circuit recently agreed. *Cavalier*, *supra*. This Court should follow the same path and draw the same conclusion.

A. Respondent's Claim Falls Outside This Court's Precedents On Antitrust Duties To Deal

Duties to deal (and the "essential facilities" theory itself) are often traced to *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912). That case, however, involved *concerted* action: a multiparty agreement for operating a terminal railroad facility, in which the members discriminated against nonmembers. Likewise, *Associated Press v. United States*, 326 U.S. 1, 10-11 (1945), involved a multiparty agreement, one that openly discriminated in membership between those who would compete with existing members and those who would not. Both cases involved simple denial to one set of would-be customers (competitors) the precise service offering being made available to others (noncompetitors); and the remedy, upon finding a violation, was self-evident—forbid the selective denial.

The rare cases in which this Court has since found liability under Section 2 for *unilateral* refusal to deal with rivals all involve a similar, common fact: the defendant was already in the business of providing customers what it then denied on the same terms to a competitor. None of the cases involved refusals of new demands for discounted sales not

otherwise being made voluntarily to others. As Judge Posner observed, these cases involve, as one "essential" fact, that the defendant chose to "withhold from one member of the public a service offered to the rest." *Olympia*, 797 F.2d at 376, 377; *see* R. Posner, *Antitrust Law* 204 (2d ed. 2001).

Thus, the defendant in *Aspen* refused to make full retail-price ski-lift ticket sales to its competitor, although it was making such sales to customers generally and had previously been voluntarily making such sales in collaboration with the competitor itself. 472 U.S. at 593-94, 608, 610-11. In *Otter Tail*, the defendant refused to wheel power for certain local-distribution competitors even though it was in the business of wheeling power for other such customers. 410 U.S. at 371, 378; *see United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 57 (D. Minn. 1971); *Cavalier*, at *11 (stressing that Otter Tail "*was* in the business of wheeling power and selling electricity at wholesale").[14] In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the defendant newspaper flatly refused sales of advertising space to persons that were customers of the defendant's competitor (a radio station). In *Kodak*, *supra*, the defendant, while selling parts to customers generally, refused to sell them to customers who bought service from competing service providers–which the Court characterized as not a "unilateral refusal to deal" at all. 504 U.S. at 464 n.8.

That all of these decisions involved the simplest form of disparate treatment *among two groups of would-be customers seeking the identical offering*–not "discrimination" between oneself and outsider-competitors, which is intrinsic to com-

[14] In addition, the Government rested liability in *Otter Tail* not just on a refusal to deal but also on sham litigation and "anticompetitive provisions in contracts with potential competitors" (SG Pet. Br. 13 n.3), amounting to territorial-allocation agreements (410 U.S. at 378). The 4-3 ruling in *Otter Tail*, thus, is not a pure refusal-to-deal ruling.

petition[15]–circumscribes the underlying antitrust principle. When the very terms refused to a competitor are voluntarily being offered to others (or previously were offered to the competitor itself), there may be reason at least to inquire why the disparity (or sudden change) reflects anything but an expectation of monopoly returns from eliminating competition: the defendant's own conduct has already presumptively revealed the dealing, rather than refusing to deal, to be in its own business interest. *See Aspen*, 472 U.S. at 603-04 & n.31. And the judicial remedy, if the disparity turns out to be unjustified, is straightforward: insist on equal availability of the same terms.

There is, in contrast, no prima facie reason to question a refusal of never-before-offered terms. Doing so would open every monopolist to the burden of entertaining and litigating demands to alter day-to-day business choices and to dismantle its retail monopoly—which Section 2 has not required. The judicial task would also be radically different. With no voluntarily adopted benchmark to use, just deciding whether a violation had occurred–well before the remedy stage–would require a fresh judicial determination of what "reasonable" prices and other terms the defendant ought to have provided.[16]

[15] Even the Robinson-Patman Act, 15 U.S.C. § 13(a), applies to discrimination only between independent retailers, not between the defendant's own retail operation and independent retailers. 14 H. Hovenkamp, *Antitrust Law* ¶ 2312c at 23-24 (1999).

[16] *Cf.* Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 844 (1989) (explaining why concerted-action cases present fewer problems: "concerted exclusion is much easier to remedy," by inclusion on nondiscriminatory terms; "admission to a joint venture is a one-time remedy that does not require day-to-day control" by the courts"; 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 658f at 130-31 (2d ed. 2002).

The unilateral conduct challenged in the present case plainly falls outside this Court's duty-to-deal precedents. Respondent does not and could not allege that Verizon was voluntarily in the business of offering price-discounted assistance of the forms now mandated under the 1996 Act. It was the 1996 Act that forced Verizon into the "brand new" wholesaler role at issue. *Verizon*, 535 U.S. at 528. Verizon is not turning away offers from competitors that it was, or is, freely accepting from noncompetitors; after all, AT&T and others are not being denied the opportunity to purchase retail services at retail rates. Respondent does not claim that Verizon denies one group of would-be customers the same thing on the same terms it provides another group; respondent claims that Verizon was deficient in performing a new regulatory duty to sell at *special* discounted rates and to treat outsider-rivals as well as it treats itself. JA 18, 39. And what respondent demands, just to decide if a violation has occurred, is a judicial determination of reasonable terms of dealing with outsiders that must be invented from scratch.

This Court's precedents do not encompass even a flat-out refusal to engage in such special discounted sales, let alone insufficient alacrity and responsiveness in making them. Even the "essential facilities" theory, as noted below, has not reached so far. Respondent thus needs an expansion of Section 2–which the Court should reject.

B. Recognizing Respondent's Claim Would Violate The Normal Requirement That Conduct, To Be Condemned As Predation, Make No Business Sense Apart From Enabling Monopoly Returns

Allowing respondent's claim would violate the general principle, reflected in *Aspen*, that defines the normal requirement for condemning unilateral conduct as unlawful under Section 2. As the Solicitor General has explained (SG Pet. Br. 11-16), conduct is lawful as long as it makes business

sense *even apart* from any expectation of monopoly returns. A *necessary* requirement of illegality, at least in this setting, is that the conduct make no business sense *except for* its enabling monopoly returns.[17] But respondent's claim fails that test.

In *Aspen*, the Court condemned the refusal to deal because the defendant imposed on itself immediate up-front costs that made no business sense except for the prospect of recouping the losses later, through monopoly returns attending a rival's diminished ability to compete. Liability rested on a finding that the defendant's *accepting* the sales, rather than refusing them, "would have entailed no cost to [defendant] itself, would have provided it with immediate benefits, and would have satisfied its potential customers." 472 U.S. at 610. By terminating a preexisting, voluntary arrangement with the plaintiff, and refusing full-price sales, the defendant "sacrifice[d] short-run benefits and consumer goodwill"; that made no sense but for the hope of recouping the loss through later monopoly returns. 472 U.S. at 610-11; *id.* at 608 (defendant "elected to forgo *** short-run benefits because it was more interested in reducing competition *** over the long run"). In *Aspen*, and the other refusal-to-deal cases, the voluntary sales to *non-competing* customers strongly indicated that such sales make ordinary business sense, thus raising a question whether refusing the same terms to a competitor makes business sense other than by undermining competition to enable monopoly returns.

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[17] It is questionable whether this requirement could be a *sufficient* condition of illegality, at least without fine-tuning the formulation to tie expected monopoly returns to impairing rivals' efficiency, rather than improving or exploiting the monopolist's own efficiency. An investment in innovation might, for example, be worthwhile only if monopoly returns are expected, yet should hardly be condemned. All that is relevant here is the simple formulation in text of a *necessary* condition of illegality–which respondent does not meet.

The requirement that conduct make no business sense except for its enablement of monopoly returns is hardly unique to refusals to deal. It underlies the predatory pricing standard of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), requiring proof *both* that the defendant was absorbing immediate losses (below-cost pricing) *and* that the losses are likely to be recouped through monopoly returns. It is also reflected in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986). Lower courts, too, have used this standard to define what is required for condemnation of unilateral action under Section 2.[18]

This standard, as a necessary requirement, gives coherent and workable content to the more general formulation that a "valid business reason[]" makes conduct lawful. *Aspen*, 472 U.S. at 605; *see Kodak*, 504 U.S. at 483. If the conduct is sustainable by the defendant without monopoly profits, *i.e.*, it

[18] Judge Bork explained in *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986): "predation involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits." For similar reliance on the need to find a short-term sacrifice sensible only because it enabled monopoly returns, see, *e.g.*, *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 523, 524 (5th Cir. 1999); *Advanced Health-Care Serv's. v. Radford Community Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987). *See also Southern Pac. Communications Co. v. AT&T Co.*, 740 F.2d 980, 999 n.19 (D.C. Cir. 1984) ("The issue is whether the defendant's conduct is reasonable in light of its business needs ***."); *Trace X Chemical, Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984) ("conduct without legitimate business purpose [is] conduct [that] makes sense only because it eliminates competition").

makes business sense without the prospect of monopoly profits, then it *is* "valid," "normal" conduct. Because such conduct cannot drive out an equally efficient rival (one with similar costs), condemning it would undermine basic antitrust policy by protecting comparative inefficiency. Leading commentators have used such an approach, focusing on *unprofitability* of the conduct without monopoly returns as an essential requirement for unlawful unilateral conduct. *See* Bork, *The Antitrust Paradox* 144-45 (1978) (predation is "an investment in future monopoly profits"); 3 *Antitrust Law* ¶ 658f at 131-32.[19]

There is no adequate substitute for this requirement. Without it, the "justification" standard is left undefined–which "begs the question of what it is" (3 *Antitrust Law* ¶ 658f at 131)–or, worse, undermines the policies that shape antitrust law. Section 2 affirmatively encourages vigorous competition by monopolists. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986). At the same time, standards that encourage costly litigation without overriding need harm the economy and the judicial system. *See Kodak*, 504 U.S. at 479 ("we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished"). Standards incapable of relatively predictable advance application,

[19] "[A] 'business justification' should be something that one reasonably assumes would be profitable to the firm. At the same time, however, an offered justification does not succeed merely because it is profitable, for one can profit from both competitive and monopolistic acts. *** Nevertheless, not even a monopolist operates as a trustee for the public. A successful business justification need not improve market efficiency overall. *** *[S]hort-term profitability must be a complete defense, lest monopolists be obliged to join every proposed joint venture.* As a general matter, a firm is under no obligation to sacrifice its own profits in order to make the overall market larger." 3 *Antitrust Law* ¶ 658f at 131-32 (emphasis added).

standards that therefore spawn many costly treble-damages actions with uncertain jury judgments, carry grave risks of deterring competition, protecting inefficiency, and inducing massive waste.[20] These problems are particularly acute in the present setting, where the discounted assistance required under the 1996 Act is novel and distinctly unnatural for incumbents, yet new entrants persistently want more, cheaper, better assistance–a recipe for the spate of Section 2 suits against incumbent telephone companies that has in fact materialized. *See* BellSouth *Amicus* Br. 3, 15 (petition stage).

In particular, a standard that condemns "willfulness" or an "intent" to vanquish rivals is at best unhelpful and at worst highly misleading, especially to juries. 3 *Antitrust Law* ¶ 651b at 73-75; *compare Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1283-90, *en banc rehearing denied over dissent*, 314 F.3d 1282 (11th Cir. 2002), *cert. pending*, No. 02-1423. Willful, intentional striving to capture every available sale from competitors, even to the point of driving them out of business, is what impels competition.[21] A

[20]*See Town of Concord*, 915 F.2d at 22 ("[A]ntitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable. *** They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings."); Baumol & Ordover, *Use of Antitrust To Subvert Competition*, 28 J. L. & Econ. 247, 254 (1985) ("The potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerrilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition.").

[21]*See* 3 *Antitrust Law* ¶ 601 at 5 ("The competitively aggressive firm always 'intends' to harm rivals if injury to rivals is a consequence of one's own increase in market share. *** [T]he same manifestations of intent can accompany competitive, socially beneficial acts (such as aggressive but remunerative price cutting) and anticompetitive, harmful acts (such as properly defined predatory pricing). As a result, bad intent is easily

firm's belief about whether means used make sense apart from expected monopoly returns may have evidentiary value in answering *that* question, but the means used, not the intent to get or keep a monopoly, must identify unlawful conduct.

Similarly, Section 2 cannot define illegal conduct by a standard requiring that competitors remain viable. Otherwise, Section 2 would forbid monopoly itself, which it does not–and which it cannot forbid without turning on the competitor who fully succeeds in what it has been exhorted to do: compete. *See* pages 14-15 & n. 10, *supra*. More generally, "harm to rivals" does not distinguish which conduct should be condemned. *Competition* harms all rivals and destroys many, and the efficiencies that Section 2 encourages (*e.g.*, innovation or economies of scale or scope) can perfectly well lead to a monopoly market. *Copperweld*, 467 U.S. at 767 ("an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster."); *Town of Concord*, 915 F.2d at 21, 23 ("a practice is not 'anticompetitive' simply because it harms competitors"; "[m]erely eliminating competitors is not necessarily anticompetitive, for *** even

proven but seldom serves to distinguish situations where the defendant's conduct deserves condemnation from those in which it should be left alone."); *id.* ¶ 651b, at 75 ("in most circumstances the intent to [behave competitively] cannot be distinguished from the intent to [monopolize]"). The unhelpful, misleading character of an "intent" standard is well recognized. *E.g.*, *Microsoft*, 253 F.3d at 59; *Town of Concord*, 915 F.2d at 21; *A.A. Poultry Farms, Inc. v. Rose Acre Farms., Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989); *Olympia*, 797 F.2d at 379; *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins. Inc.*, 784 F.2d 1325, 1338-39 (7th Cir. 1986) (Easterbrook, J.); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 583 (D.C. Cir. 1984) (panel including Ruth Ginsburg, J.); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.).

legitimate business activity that succeeds in helping a firm will likely disadvantage the firm's competitors").[22] Section 2 has never condemned such results, and it cannot do so without turning the Sherman Act into a law that suppresses rather than encourages efficiency.

Respondent's claim fails under the normal predation requirement, because the conduct at issue cannot be condemned as making no sense except for monopoly returns from lessened competition. SG Pet. Br. 11-16. What is challenged is Verizon's alleged failure to provide adequate assistance at forced discounts to rivals, even mere resellers, to help them sever Verizon's relationship with its retail customers. Respondent does not and could not responsibly allege, and the Second Circuit did not conclude, that even an outright refusal to provide such assistance–and to establish elaborate, costly mechanisms for dealing with intermediaries on such terms–would make no business sense for Verizon but for the prospect of monopoly-level returns.[23] It is granting,

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[22] *Ball Memorial*, 784 F.2d at 1338 ("Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals – sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. *** Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition.").

[23] In New York, where 25% of the business and residential lines are now served by competitors, about two thirds of the competitors' lines are leased under UNE rates. FCC, *Local Telephone Competition*, *supra*, tables 6, 8. Verizon leases out those lines at an average of $19.14 per line, giving up the average of $41.98 per line revenue it obtains selling at full retail prices (and sacrificing the customer relationship that might lead to sales of more services). NYPSC, *Analysis of Local Exchange Service Competition in New York State* 10-12 (2002), www.dps.state.ny.us/telecom/telanalysis.htm; NYPSC, *Press Release*, www.dps.state.ny.us/fileroom/doc11086.pdf.

not denying, the discounted access, with the ensuing severance of important customer relationships, that requires a sacrifice that no ordinary competitor would freely make. The challenged failures in providing such access are therefore lawful under Section 2.

C. Recognizing Respondent's Claim Would Raise Special Unsolvable Problems Of Antitrust Policy, Including Inappropriate Transformation Of Judges And Juries Into Regulatory Agencies

Respondent's claim should fail even if it met the normal requirement for predatory conduct. This novel claim for affirmative assistance in the piece-by-piece uprooting of local telephone companies' historical monopolies raises distinctive antitrust policy problems, both substantive and institutional. These problems of forced sharing are not solvable in a system of treble-damages jury-determined litigation. They traditionally have been, and should remain, the preserve of special regulatory regimes.

1. Substantively, respondent's proposed Section 2 duty to provide rivals adequate affirmative assistance presents two unavoidable problems. *First*: Forced sharing reduces the incentives that antitrust law centrally encourages–to make investments in competing facilities and thus raise output. Incumbents will invest less if they must share the rewards of their investments, because rivals will use the incumbents' investments that turn out well, while incumbents alone shoulder the burden of investments that do not. At the same time, forced sharing diminishes the incentive of *new entrants* to make independent investments whenever the incumbent's

facilities or services are available at prices low enough to make the choice of sharing less costly or risky.[24]

Second: A duty of forced sharing on terms not already being offered to others creates significant costs of implementation. *See Iowa Utilities*, 525 U.S. at 428 (Breyer, J., concurring in relevant part) ("compulsory sharing can have significant administrative and social costs"; "someone must oversee the terms and conditions of that sharing"); *United States Telecom Ass'n*, 290 F.3d at 427 (quoted above).[25] There must be means for negotiating and litigating over the arrangements between incumbent and any number of new entrants; means for allocating facilities or services between incumbents and rivals, and between rivals themselves; means for handling billing and collection in two layers rather than

[24] *See Iowa Utilities*, 525 U.S. at 428-29 (Breyer, J., concurring in relevant part) (sharing "may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor"; "[n]or can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement"); *United States Telecom Ass'n*, 290 F.3d at 424, 427 ("Some innovations pan out, others do not. If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."; "Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."); 3A *Antitrust Law* ¶ 771b at 171-72 ("[f]orcing a firm to share *** discourages [competing] firms from developing their own alternative inputs").

[25] Two economists skeptical of incumbents' legal positions have explained the high implementation costs and inherent uncertainties of a regime under which entrants demand ever more and incumbents resist, producing persistent disputes over terms, to be resolved based on standards that produce no reliably correct answers. Joskow & Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 Stan. L. Rev. 1249, 1281-84 (1999).

one; means for relaying and responding to communications–about new service orders, service changes, service quality, and so forth–from customer to entrant back up to the actual service supplier. How high these costs can get is shown by the multibillion dollar investments incumbents have made to create new "operation support systems" and to manage the negotiate-arbitrate-litigate system that the 1996 Act establishes.

That investment-deterring risks and transaction costs accompany sharing duties is a fact familiar from property law. One of the most "essential" aspects of property, acknowledged under the Constitution itself, is the right to exclude others, *i.e.*, not to have to share involuntarily. *Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Exclusive property rights–and clarity of such rights–are important for an efficient, competitive, capital-intensive market system, in which owners can confidently make risky investments for which they alone will reap the rewards. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730-31 (2002) ("clarity" in property rights "is essential to promote progress, because it enables efficient investment in innovation"); Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621, 624 (1998) (multiple rights of access diminish investment incentives).

2. To recognize these risks and costs does not imply that there never could be a potential benefit from compelled sharing. Congress plainly predicted that such benefits would result from the regulatory regime it created in the 1996 Act. *See Verizon*, 535 U.S. at 510 n.27. But there is no available basis for courts (much less juries) reliably to determine when the possibility of benefits overrides the risks and costs. The only approach is experimental, reasoned balancing, with constant adjustment–for which antitrust is distinctly unsuited.

The risk that the costs of a sharing regime will outweigh benefits are greatest when the benefits are thinnest–which they are in a case like the present one, where the sharing is so complete that the rival simply resells the incumbent's service, relying not only on the incumbent's facilities but on its personnel to operate them. In such cases, the rival is competing only to reduce costs within the marketing slice of the business, making no contribution to finding cheaper or better equipment to reduce all other service *creation and delivery* costs. Resale thus presents the smallest chance that benefits will outweigh the costs of adding the middleman layer and deterring independent investments. For such reasons, several courts of appeals, well before the 1996 Act, rejected claims under Section 2 to insert such "non-competitive middlem[e]n" as resellers into what had evolved as integrated retail businesses.[26] When a market has cut out the middleman, antitrust has not reinserted one by force.

Pure resale presents only the most extreme case, for the difficulties of confidently striking a net-beneficial balance are insuperable generally–even when particular competitors have some of their own equipment and facilities to use in conjunction with the incumbent's facilities. There is simply no basis to assume that "more sharing" will enhance efficiency, not when it is forced at discounted prices rather than evolving voluntarily.[27] Even the 1996 Act is no more

[26] *HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877-78 (6th Cir. 1991); *MCI*, 708 F.2d at 1149; *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353 (5th Cir. 1980).

[27] *See Iowa Utilities*, 525 U.S. at 429 (Breyer, J., concurring in relevant part) ("The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these [investment-deterring and transaction] costs will become serious. *** And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide. *** Nor are any added

than an experiment.[28] The need to weigh risks and costs against potential benefits is intrinsic to respondent's claim. Yet the standards for doing so have none of the reliability required for a treble-damages, jury-determined antitrust system, in which uncertainty itself adds massive litigation costs and risks, creating inevitable pressure toward *over*generous terms of sharing.[29]

Most concretely, any determination of overall costs and benefits from a sharing duty necessarily depends on the specific price and other terms of sharing. Yet determining such terms, here in a technically complex and fast-changing context, is a task that historically, and properly, has been reserved for special agency-administered regimes. Regulatory agencies are characterized by industry-specific expertise developed over time, procedural and information-gathering flexibility, continuity of attention, and, perhaps most important, the ability to experiment prospectively and to alter policies as evidence suggests that an experiment has failed or circumstances have changed. There is no guarantee that regulators will always get the terms right, but with their expertise and flexibility, they have a clear comparative advantage over antitrust litigation. *Far East Conf. v. United*

costs imposed by more extensive [sharing] requirements necessarily offset by the added potential for competition.").

[28] "We cannot say whether the passage of time will show competition prompted by TELRIC [the low-price methodology prescribed by the FCC] to be an illusion ***." *Verizon*, 535 U.S. at 523. Subject to constitutional constraints, of course, Congress is free to adopt the experiment of industry improvement.

[29] *See* Baumol & Ordover, 28 J.L. & Econ. at 254, 264 ("Mere accusation and trial subjects the defendant firm to enormous expenses and even greater ex ante risks of an expensive adverse decision, even if it transpires ex post on the basis of convincing evidence that it is completely innocent."); *Associated General Contractors v. California Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (justification needed to allow "potentially massive factual controversy to proceed").

States, 342 U.S. 570, 574-75 (1952) (specialization, experience, flexibility). And, of course, regulators' ability to approach system-wide consistency is unmatched by an antitrust regime in which results can vary from case to case and jury to jury.

The comparative institutional weakness of antitrust courts is reflected in antitrust law's extreme (if not absolute) reluctance to take on such tasks. Because determinations of proper prices are deeply uncertain ("[e]ven full-time regulators have great difficulty" making such determinations), and price regulation "inevitably distorts the incentive to reduce costs or engage in further innovation" and tends to chill new entry that higher prices might attract, "[a]ntitrust courts have rightly resisted undertaking the heavy, continuous, and unguided burden of supervising the economic performance of business firms."[30] Then-Judge Breyer explained in *Town of Concord*, 915 F.2d at 25, in the related context of price-squeeze law, "why antitrust courts normally avoid direct price administration":

> [H]ow is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years?

[30] 3 *Antitrust Law* ¶ 720b at 256 (footnote omitted, noting rare exceptions embodied in judicial decrees); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (recognizing problems with antitrust price administration); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (to examine reasonableness of price is to "set sail on a sea of doubt"); *see Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1225 (9th Cir. 1997) (rejecting even a remedial "reasonable price" order, restricting order to "non-discriminatory pricing").

> Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?

Tasks at least as inappropriate as those are absolutely unavoidable under respondent's view of Section 2. Unlike in *Aspen* and similar cases, judges and juries adjudicating claims like respondent's would have no ability simply to use voluntarily adopted terms of dealing with other customers as the benchmark for dealing with rivals. Such terms would have to be determined afresh.

These refractory problems could not be sidestepped by simply transposing regulatory determinations under the 1996 Act into the Sherman Act. The savings clause of the 1996 Act, by leaving antitrust standards where the Act found them, precludes antitrust adoption of 1996 Act standards just because they are conveniently available under the 1996 Act. 47 U.S.C. § 152 note, Pet. App. 103a. Substantively, moreover, the standards do not fit: the 1996 Act's policy of aggressive jump-starting of new entry (to uproot monopolies, an "entirely new objective," *Verizon*, 535 U.S. at 488) has never been part of the Sherman Act. For pricing particularly, while the 1996 Act has led to special low prices, antitrust law itself does not bar a monopolist from charging any price it finds profitable. *See* 3 *Antitrust Law* ¶ 720a at 254-56; SG Pet. Br. 11 (monopolists may charge "whatever rates they can obtain in the marketplace").[31] The FCC has noted that, in

[31] *See Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1412-13 (7th Cir. 1995) (Posner, C.J.); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548-49 (9th Cir. 1991); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) (Breyer, J.); *Trace X*, 738 F.2d at 267-68;

specific contrast to the 1996 Act standards, "the essential facilities doctrine allows monopolists to continue charging monopoly rates for use of their facilities." *UNE Remand Order*, 15 FCCR 3696, ¶ 60 (1999); *see* 3A *Antitrust Law* ¶ 771b at 172, ¶ 772c2 at 188, ¶ 773b2 at 203, ¶ 774d at 217; SG Pet. Br. 14 ("The antitrust laws do not require monopolists to sacrifice profits to sell to competitors at a discount.").

There would, in short, be no escaping the imposition of novel and inappropriate regulatory tasks on antitrust judges and juries if Section 2 were now expanded to embrace respondent's claim. Antitrust judges and juries would become the shadow, omnipresent regulators of the telecommunications industry–even more than the district court that supervised the Bell breakup decree. The Bell decree regime was pointedly rejected by Congress in the 1996 Act. 47 U.S.C. § 152 note (1996 Act § 601); H.R. Conf. Rep. 104-458 at 198-201 (1996).

D. The 1996 Act Regime Makes A Novel Extension Of Section 2 Duties Especially Inadvisable

Section 2 would be the wrong vehicle for respondent's new duty of discounted affirmative assistance even if no regulatory regime were in place to address the very matters at issue. In fact, the 1996 Act already establishes such a regulatory regime. This regime provides conclusive reason not to transform Section 2, and antitrust courts, as respondent's claim demands.

1. "Immunity" Aside, The 1996 Act Regime Counts Against Respondent's Novel Section 2 Duty

The Second Circuit discussed the 1996 Act primarily in explaining why it creates no "antitrust immunity." Pet. App.

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979).

31a-33a. But Verizon did not, and does not, argue for antitrust immunity, *i.e.*, for the implied repeal needed to abrogate an otherwise-established Sherman Act proscription based on another statute at odds with the Sherman Act. Rather, the role of the 1996 Act in the market, and the institutional landscape, shapes the decision whether to expand antitrust standards themselves.

Even outside the antitrust setting, and without invoking any implied-repeal principle, this Court has looked to later-enacted, specific statutes to reject or confine claims under earlier, more general statutes that had not previously been extended to the situation at hand, and that did not unavoidably cover it.[32] That approach is particularly apt for the 1996 Act. The Act's savings clause (47 U.S.C. § 152 note, Pet. App. 103a) indicates that previous limits on Section 2 assistance duties were *not* altered by the Act's creation of new assistance obligations. *See Cavalier*, at *12.

Antitrust law has long recognized that regulatory regimes help shape Section 2 standards.[33] *Town of Concord* illustrates

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[32] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-82 (1989) (accommodating 42 U.S.C. § 1981 to Title VII); *United States v. Fausto*, 484 U.S. 439, 453 (1988); *cf. J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 & n.9 (2001) (later specific statute overriding prior statute already construed to contrary, versus later specific statute governing where earlier statute not previously construed to contrary).

[33] *See Citizens & S. Nat'l Bk.*, 422 U.S. at 91 ("careful account must be taken of the pervasive federal and state regulation characteristic of the industry"); *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, J.) (antitrust courts must "accommodate the peculiar circumstances under which regulated entities operate. *** '[A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the

one of the several ways in which regulation can be relevant. There, the First Circuit reversed a verdict and rejected a Section 2 claim of price squeeze, as a matter of law, because both the wholesale and retail levels of the product (electric power) were price regulated. Regulation, the court explained, "dramatically alters the calculus of antitrust harms and benefits" and "significantly diminishes the likelihood of major antitrust harm"; it also creates special potential for institutional interference, so that "the relevant antitrust considerations differ significantly, in degree and in kind." 915 F.2d at 25, 28. That use of regulation in shaping antitrust standards requires no *trial*. *Town of Concord*, far from relying on any adjudication of the "effectiveness" of the regulatory regime, relies entirely on publicly available legal and economic materials, with no citation to any record of a regulatory-effectiveness trial. Here, the pertinent aspects of the 1996 Act are plain on the face of the statute and beyond triable dispute, as *Goldwasser* held. *See also Cavalier*, *supra*.[34]

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peculiarities of an industry as recognized in a regulatory statute.'") (quoting Areeda treatise), *modified*, 1982 WL 11277 (9th Cir.).

[34] This Court has found even the demanding immunity standard of strong incompatibility met without trial. *E.g.*, *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).

A quite distinct use of regulation is reflected in the principle that a Section 2 claim can be defeated based on the defendant's good-faith reliance on regulatory policies asserted to be incompatible with competition. *E.g.*, *Southern Pacific*, 740 F.2d at 1009-10; *MCI*, 708 F.2d at 1081; *Phonetele*, 664 F.2d at 716; *Almeda Mall*, 615 F.2d at 354. In that context, a record may have to be developed, and a trial may have to be held, on certain issues–*e.g.*, good faith reliance–if, for example, regulatory policies have to be discerned from how a general discretionary authorization to regulate has in fact been exercised.

2. *The 1996 Act Regime Substantially Eliminates Competitive Risks And An Antitrust Duty Threatens To Impair That Regime*

a. The 1996 Act regime reduces to insignificance any possibility of competitive harm, *i.e.*, any possibility of "'more-than-temporary harmful effects on competition,'" of a market-wide and "enduring adverse impact on competition itself." *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 482 (5th Cir. 2000) (quoting 3A *Antitrust Law* ¶ 782 at 259); *American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997). The substantive guarantees of assistance under Section 251 are, to understate matters, no *less* demanding of incumbents than Section 2. And, procedurally, the 1996 Act guarantees any new entrant a right to a fast, judicially reviewable agency determination of any assistance claim under those standards–all further backed by systemic reviews in connection with the Bell companies' long-distance authority. Nothing remotely similar was present under prior regulatory regimes, like the regime in *Otter Tail*, 410 U.S. at 375, which did not guarantee the access at issue at all. Pet. App. 35a.

Under the uniquely comprehensive 1996 Act, every challenged aspect of an incumbent's dealing with a competitor falls into one of two categories. If the challenged conduct is authorized by the competitor-incumbent agreement, then it has, by statute, already been approved by regulators: indeed, such approval *either* was agreed to by the competitor *or* was imposed by regulators with either party entitled to judicial review. If, on the other hand, the challenged conduct is not authorized by the competitor-incumbent agreement, then *either* the competitor never sought an agreement barring such conduct, despite the statutory right to have done so (including agency and court review), *or* the conduct is a violation of the agreement and can be redressed

through enforcement mechanisms defined in the agreement or imposed by regulators. This case is illustrative: multiple levels of enforcement redressed the problem underlying the present case within a few months.

Unlike prior regulatory schemes, the 1996 Act is not one of broad agency discretion to delay consideration of claims for long periods. Under the 1996 Act procedures, there is no significant possibility that the regulatory agencies, and then the courts on review of those agencies, would miss any sufficiently strong and market-affecting claim of assistance that could be even a candidate for antitrust recognition. For that to occur, multiple agencies and the courts would have to fail systematically in their jobs under the 1996 Act–in which case there is as much reason to expect antitrust judges and juries to fail as well. The expertise, flexibility, and multiple layers of scrutiny built into the 1996 Act regime make that regime far more likely to make reliable judgments about competition. As *Goldwasser* correctly concluded, coverage by Section 2 "would add nothing to the oversight already available under the 1996 law." 222 F.3d at 401.

b. As *Goldwasser* also concluded, *id.*, a new antitrust duty, administered through discrete jury determinations and treble-damages awards, seriously risks impairing the 1996 Act regime. That regime contemplates an intrinsically experimental, shifting *balance* by FCC and state policy-makers to ensure, among other things, that sharing does not get pushed to the point where it reduces independent investment and raises transaction costs to self-defeating levels. The striking and altering of that balance would be threatened by the looming prospect that juries might impose class-action treble-damages liability for too little sharing.

Any standard of Section 2 liability that would allow respondent's claim would leave, at a minimum, a vast range of uncertainty about what antitrust judges or juries will condemn. An antitrust liability finding may conflict with a

past agency determination or simply bypass agency processes for making the critical judgments. An antitrust judgment that a particular form of assistance was deficient at some point in time will make it much harder for regulators to wean entrants off that form of help later on, even after regulators have reevaluated evidence of an initial experiment or market conditions have changed.

More broadly, adding antitrust processes to the regulatory processes addressing the same matters vastly inflates costs, draining resources from actual marketplace competition. And the costs of class-action antitrust litigation and uncertain risks of treble-damages liability, even limited to violating regulator-imposed requirements, is certain to skew the behavior of all participants in regulatory processes. Regulators will have to be more cautious about experimenting with new sharing obligations, if any violations are then likely to engage the heavy artillery of antitrust. Incumbents will have to be more cautious about accepting–rather than contesting in court–each new regulatory imposition, if part of the cost of acquiescing is new exposure to treble-damages litigation.

The regulatory task of carrying out the experiment of the 1996 Act is difficult enough without all these distractions. It should not be further complicated by creating a new Section 2 duty to duplicate, supplement, override, or otherwise interfere with the multi-layer regime of the 1996 Act.[35]

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[35] *See* Remarks of John A. Rogovin, FCC Acting General Counsel, Manhattan Institute (Oct. 30, 2002), available at www.manhattan-institute.org/html/clp_10-30-02.htm ("unquestionably there is going to be a lot of tension" between antitrust litigation and FCC implementation of 1996 Act; "[I]t's difficult to imagine how a private case getting into this 'essential facilities' issue—dealing, for example, with the local loop—is not going to bump up quite seriously into what the commission is doing").

E. Respondent's Claim Should Not Be Recognized Under An "Essential Facilities" or "Monopoly Leveraging" Theory

Respondent's claim cannot properly be sustained on the non-Supreme-Court theories invoked by the Second Circuit.

1. Essential Facilities

The Second Circuit invoked an "essential facilities" duty of a monopolist "to provide competitors with reasonable access to *** facilities under the monopolist's control and without which one cannot effectively compete in a given market." Pet. App. 29a-30a. But this Court has not recognized any such sweeping theory of Section 2 liability. Indeed, the Court expressly avoided reliance on the doctrine in *Aspen*, 472 U.S. at 611 n.44, and has not recognized it elsewhere. *See Iowa Utils.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part).

This case is no occasion to adopt any such doctrine. Leading commentators have urged outright repudiation of the doctrine as raising just the sorts of substantive and institutional problems discussed above–problems inherent in the Second Circuit's open-ended declaration that the doctrine guarantees "reasonable" terms of access.[36] But whether any

[36] *See United States Telecom Ass'n*, 290 F.3d at 424, 427 n.4 ("scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access, and accompanying judicial price setting"); 3A *Antitrust Law* ¶¶ 770e, 773a at 167-169, 195-98; *id.* ¶ 771c at 173 ("Lest there be any doubt, we state our belief that the essential facility doctrine is both harmful and unnecessary and should be abandoned."); Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 St. Louis U. L.J. 433, 479-80 (1987) (long-time Antitrust Division economist and scholar: "The Supreme Court has never acknowledged the essential facility doctrine. The Court's abstention was wise. The lower courts should reject the doctrine.").

such doctrine should be adopted in other circumstances, no such doctrine could soundly embrace respondent's claim, for all the reasons of precedent and principle already explained.

In fact, even in the lower courts, the doctrine, though frequently *articulated*, has almost never been relied on to support liability for unilateral action–certainly never for claims like respondent's. *See* Pet. 17-18 n.12 (quoting explanation of AT&T, a principal proponent of 1996 Act rights, that essential-facility analysis had never extended to a context like that of Section 251). Recognizing how profoundly difficult it is for courts to prescribe terms of access, the lower courts have repeatedly identified limitations that have led to rejection of claim after claim. They have explained, for example, that a defendant need not transform its business from a service business to a facilities-rental business,[37] that the defendant had not *denied* access,[38] or that a defendant need not give "preferential access" or "abandon its facilities" or "cease using its own facility so that [a rival] can begin using it."[39]

Strikingly, there may be only a single case of liability for unilateral action being upheld under the doctrine–the Seventh Circuit's *MCI* case in 1983.[40] But that decision does not

[37] *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544-45 (4th Cir. 1991); *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir. 1992).

[38] *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *see Alaska Airlines*, 948 F.2d at 545-46.

[39] *MCI*, 708 F.2d at 1133; *cf. City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992).

[40] *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), which seems to have introduced the "essential facilities" term, involved a multiparty *contract* of exclusivity. *See also Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (concerted action).

support recognition of respondent's claim. Indeed, it *rejected* liability on a claim similar to respondent's and found liability only on a claim closer to the plaintiff's claim in *Aspen*.

Thus, *MCI* rejected a demand that AT&T allow MCI to buy and resell AT&T's long-distance service in order for MCI to fill out its still-young long-distance network. MCI was relegated to the (usual) step-by-step process of building its own. 708 F.2d at 1148-49. As the Seventh Circuit later explained (*Burris*, 935 F.2d at 1484), "AT&T's refusal to voluntarily assume 'the extraordinary obligation to fill in the gaps in its competitor's network' did not suffice to support a finding that it was trying to maintain its monopoly of long-distance telephone service by anticompetitive means." *Goldwasser* relied on *that* part of *MCI* to reject local-market-access claims like respondent's. 222 F.3d at 400.

MCI upheld liability, in contrast, based on AT&T's refusal to sell to MCI, as a competitor, the very same connections (for "FX" and "CCSA" service) that AT&T was already in the business of offering to "local customers independent telephone companies and others." 708 F.2d at 1144; *Bell System Tariff Offerings*, 46 FCC2d 413, 426 (1984) ("Bell presently has arrangements with *** numerous independent telephone companies for access to its local distribution facilities for the purpose of enabling *** [them] to provide FX and CCSA services"), discussed at 708 F.2d at 1097, 1134; *see MCI Communications Corp. v. AT&T Co.*, 462 F. Supp. 1072, 1092 (N.D. Ill. 1978). Indeed, MCI sought damages based simply on the price AT&T was voluntarily charging Western Union. 708 F.2d at 1095, 1165. As in *Aspen*, therefore, the court was not being asked to transform itself into a regulatory agency that would determine afresh the "reasonable" price and other terms of dealing. It was being asked to vindicate a principle of equal dealing among outside customers, and that is all it did.

That is enough to exclude respondent's claim, but the circumstances present in *MCI* further distinguish this case. MCI was not "asking that AT&T in any way abandon its facilities" (708 F.2d at 1133), which loop rental and physical collocation under Section 251 do require. *See Local Competition Order*, 11 FCCR 15,499, ¶ 385 (1996). Moreover, like the power network in *Otter Tail*, local service operated under exclusive franchises at the time of *MCI* (708 F.2d at 1093), thus protecting incumbents' local investments and mooting any issue of deterring competitors' local investments (which were already barred). Section 253 today removes legal protections against local entry. Further, in *MCI* there was no law guaranteeing prompt, reviewable agency action on demands for access: it took almost a decade for the FCC, acting under broadly discretionary standards, to provide MCI the access it sought. Today, the 1996 Act indisputably provides, by plain textual guarantee, quick regulatory action on access demands, eliminating any meaningful prospect of an uncorrected genuine competitive problem.

2. Monopoly Leveraging

The Second Circuit also relied on "monopoly leveraging" as a distinct Section 2 theory–forbidding "use" of one monopoly to "gain a competitive advantage" in another market, even when the two "markets" are vertically related (wholesale and retail). Pet. App. 30a. But that theory, largely discredited even in the lower courts (Pet. 21-22), can provide no separate ground of Section 2 liability here. Any such doctrine could not reach respondent's claim for all the reasons already discussed. Even more fundamentally, however, any such standard for liability is inconsistent with the statute, precedent, and policy.

A liability standard that hinges on merely "using" a monopoly does nothing to distinguish efficiency-enhancing or competition-inviting conduct from efficiency-harming or competition-deterring conduct. A monopoly may be "used"

to charge *high* prices, which positively *invite* new entry. Or it may be "used" to charge *low* but nonpredatory prices, serving efficiency by exploiting economies that come from monopoly scale. *Brooke Group*, 509 U.S. at 223-24; *see* SG Pet. Br. 17 ("use of monopoly power is not unlawful"). The normal requirements for condemning conduct–rather than "using" monopoly–are critical to protecting against consumer-harming challenges to superior efficiency from multi-market integration or superior aggressiveness. The threat from such challenges is particularly stark when the "two markets" are simply the (1) making and (2) selling of the same service, which are commonly "integrated" throughout the economy. *See* Posner, *Antitrust Law*, at 224. And a "use" standard addresses none of the *distinctive extra* reasons for limiting Section 2 duties of affirmative assistance.

Similarly, both the statute and this Court's precedent make clear that Section 2 condemns unilateral conduct "*only* when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports*, 506 U.S. at 459 (emphasis added); *see Copperweld*, 467 U.S. at 767 ("The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization.").[41] "Gaining a competitive advantage" in the second market does not amount to actual or threatened monopolization of that market (or it would add nothing to those requirements) and says nothing at all about any effect on the first market. As *Copperweld* explains, 467 U.S. at 767, Section 2 provides wide breathing space for unilateral conduct, lest aggressive competition be chilled, precisely by insisting on actual or threatened monopolization.

[41] *United States v. Griffith*, 334 U.S. 100, 107 (1948), had one statement about "competitive advantage." But even that statement, when later quoted, was tied to getting or keeping "monopoly power" (*Kodak*, 504 U.S. at 483); *Griffith* did not involve *vertical* integration; and the statement cannot be read in isolation without conflicting with the statute, *Spectrum Sports*, and *Copperweld*. *See* 3 *Antitrust Law* ¶ 613 at 30-31; *id.* ¶ 652b at 91-92.

For these reasons, there is no separate offense of monopoly leveraging under Section 2. "Leveraging" as a concept describes various actions relating to two markets—some beneficial, some perhaps not. What distinguishes them, under Section 2, are the requirements for predatory conduct. It is those requirements that must be met, and they are not.

II. RESPONDENT LACKS STATUTORY STANDING

Respondent is not a customer of Verizon, or even a would-be customer of Verizon, but a customer of Verizon's customer, AT&T. Respondent does not allege excessive prices or deficient service available from Verizon; any such claim would run into filed-tariff-doctrine problems. Rather, respondent alleges poor AT&T service caused by the harm that Verizon did to AT&T. This claim cannot support statutory standing.

Allowing respondent to sue would violate the long-standing principle construing federal statutes not to reach those injured only indirectly. *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (Holmes, J.) ("The general tendency of the law *** is not to go beyond the first step."). This "requirement" demands a "direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69. The requirement is embodied in the antitrust laws. *See* 15 U.S.C. § 15; *Holmes*, 503 U.S. at 267 n.13; *Associated Gen. Contractors*, 459 U.S. at 534, 540 (citing *Darnell-Taenzer*). It is reflected specifically in antitrust law's bar on indirect-purchaser standing. *Utilicorp*, *supra*; *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Here, the alleged injury was indirect: it derived entirely from harm to the direct customer.

The Second Circuit cited this Court's decision in *Blue Shield v. McCready* to support respondent's standing, but plaintiff's injury in *McCready* was *direct*: the defendant refused to pay her. *See Associated Gen. Contractors*, 459 U.S. at 540 n.44 (*McCready* involved "direct" injury). And the Second Circuit cited no basis for creating an exception to the normal rule when the directly injured firm is also a competitor of the defendant. The injury to the indirect purchaser remains indirect in such a case, and the reasons for the direct-injury requirement continue to apply. *Cf. Associated Gen. Contractors*, 459 U.S. at 527-28 (harmed intermediaries were competitors of some defendants).

The policies behind the direct-purchaser restriction make standing particularly inappropriate here. There are obvious difficulties in determining how much if any of the poor service quality that respondent says it suffered was due to Verizon, and how much due to AT&T itself, or to any of AT&T's other suppliers. *See Holmes*, 503 U.S. at 269; *Associated Gen. Contractors*, 459 U.S. at 542-43. Some amount of the compensation received by the direct customer (AT&T) may already have been passed through to respondent, in the form of improved service quality or lower prices. *See Holmes*, 503 U.S. at 269; *Associated Gen. Contractors*, 459 at 543-544. And AT&T and other competitors can be "counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 270; *Associated Gen. Contractors*, 459 U.S. at 541- 542.

Concentrating full enforcement power in the directly injured party promotes enforcement. It also raises the likelihood that the parties that actually do the sharing will resolve their disputes efficiently, without the prospect of further litigation and liability exposure hovering over every

attempt to resolve disputes.[42] Here, the regulators approved an exclusive nonjudicial dispute resolution mechanism written into the AT&T-Verizon agreement. Treble-damages class actions, filed by indirect customers, can only deter efficient resolution of the countless differences that will inevitably arise under a sharing scheme as novel and vast as the one created by the 1996 Act.

CONCLUSION

The judgment of the court of appeals reinstating the antitrust claims should be reversed.

Respectfully submitted.

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[42] *See* Epstein, *Into the Frying Pan: Standing and Privity Under the Telecommunications Act of 1996 and Beyond* (Dec. 2002), __ Col. Sci. & Tech. L. Rev. ___, http://ssrn.com/abstract_id=362620; Landes & Posner, *Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws?*, 46 U. Chi. L. Rev. 602, 604-05 (1979) ("allowing indirect purchasers to sue would probably retard rather than advance enforcement").

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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?

RULE 29.6 STATEMENT

Respondent is a limited-liability partnership organized under the laws of the State of New York. It has no parent corporation, and no publicly-held firm owns a 10% or more interest in it.

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BRIEF FOR RESPONDENT

Section 2 of the Sherman Act, 15 U.S.C. § 2, bars a company with monopoly power from excluding rivals by anticompetitive acts – that is, acts not premised on the monopolist's superior efficiency. This Court and the courts of appeals have consistently applied that standard to evaluate claims that a monopolist has anticompetitively refused to deal with competitors, including claims that a monopolist has denied competitors access to essential facilities. Verizon would have the Court scrap this settled law and replace it with a standard that immunizes a monopolist's exclusionary conduct except in the rare case in which the monopolist has sacrificed short-term profits in pursuit of a long-term monopoly. Ironically, Verizon advances this contention in the very context in which the antitrust standards Verizon seeks to discard have been spectacularly successful in promoting consumer welfare. The antitrust cases that ended the Bell System's long distance and telephone equipment monopolies – which were based on claims that Bell refused to deal with competitors and denied them access to essential facilities – brought about sharply reduced prices, a proliferation of new consumer options, and an explosion in investment and innovation in the telecommunications sector.

Had Verizon's proposed standard been the law then, those cases would have failed. If it is adopted now, the prospects for real competition in the market for local telephone service – the last bastion of the Bell monopoly – will darken considerably. It is no happenstance that the Telecommunications Act of 1996 includes an express antitrust savings clause. Congress understood that regulation alone might not suffice to end monopoly control of local telephone markets, and that antitrust enforcement might be needed if incumbents resisted the transformation to

competition. Indeed, that is precisely what happened in the long distance and equipment markets. Verizon has advanced no persuasive reason for ignoring this history and rewriting Section 2 law to immunize the conduct at issue here. To the contrary, as will be shown, the theoretical policy arguments Verizon advances are irrelevant in the present context, and if applied generally would diminish consumer welfare.

COUNTERSTATEMENT OF THE CASE

A. The Bell System Monopoly.

Until 1984, the vast majority of the nation's local telephone service was provided by companies that were part of the integrated Bell System. These state-franchised monopolies were affiliated with AT&T, which monopolized the long distance market, and Western Electric, which monopolized the business of manufacturing telecommunications equipment. The Bell System's dominance depended upon its control of the networks used to provide local telephone service. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 413 (1999) (Breyer, J., concurring in part, dissenting in part). Such networks consist of lines (local loops) from each customer's home or business to switches, as well as lines (trunks or transport facilities) between the switches. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489-90 (2002).

The Bell monopoly initially came into existence through a combination of anticompetitive conduct and government facilitation. In the early 1900s, independents owned as many phone stations as did the Bell System. Roger G. Noll & Bruce M. Owen, *The Anticompetitive Uses of Regulation:* United States v. AT&T, *in The Antitrust Revolution* (J. Kwoka & L. White eds., 1989). But the Bell System refused to allow competitors to interconnect with Bell's network,

making it impossible for the customers of competitors to call or receive calls from Bell customers. The Bell System likewise refused to allow connection of telephones and other non-Bell equipment to the network. *Id.*; *see also* Michael Kellogg *et al.*, *Federal Telecommunications Law* 11 (1992); H.R. Rep. No. 103-559(II) at 32 (1994) ("H. Rep."). This strategy succeeded, and the Bell System grew into the dominant provider of telephone service. State public utility commissions solidified Bell's control "by refusing to certify any telephone company which would duplicate service already available." H. Rep. at 34.

In subsequent years, state commissions remained content to superintend a traditional rate-of-return regime in local markets. Because local service was considered a "natural monopoly," the incumbents were given exclusive franchises, and state commissions set retail prices. *AT&T Corp.*, 525 U.S. at 371; *Verizon*, 535 U.S. at 477. On the federal level, the Communications Act of 1934 applied similar rate regulation to AT&T's interstate services. Operating with the safety net of government protection and guaranteed rates of return, the Bell System built up the vast local telecommunications infrastructure that exists today.

In the 1950s and 1960s, the FCC, "recognizing the feasibility of greater competition, passed regulations to facilitate competitive entry." *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994). In 1957, the FCC required the Bell System to permit customers to interconnect customer premises equipment to the network, thereby making competition in the equipment market possible. *See Hush-A-Phone Corp. v. American Tel. & Tel. Co.*, 22 F.C.C. 112, 114 (1957). The FCC reiterated the requirement in a proceeding in 1968. *See In re Use of the Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C.2d

420 (1968); *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983). Shortly thereafter, the FCC also required the Bell System to permit long distance competitors to interconnect to the Bell network. *See In re Applications of Microwave Communications, Inc. for Construction Permits*, 18 F.C.C.2d 953, ¶ 37 (1969); *In re Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Servs.*, 29 F.C.C.2d 870 (1971), *aff'd*, 513 F.2d 1142 (9th Cir. 1975); *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1354-57 (D.D.C. 1981) ("*AT&T*").

These regulatory efforts failed to produce competition. "The Bell System's reaction was characteristically hostile [and] the FCC's attempt to ascertain the competitive implications proved characteristically halting." H. Rep. at 46; *see also* Stephen Coll, *The Deal of the Century* 373 (1986) (describing FCC testimony regarding its inability to keep the Bell System in line). Thus, "[b]y the fall of 1974, it was again apparent that regulation would not curtail the Bell System's anticompetitive tendencies – indeed, that it was characterized by inaction and equivocation." H. Rep. at 47. Thereafter, when the FCC imposed additional requirements that local Bell Operating Companies ("BOCs") provide reasonable and nondiscriminatory interconnection to long distance carriers (and imposed detailed interconnection and unbundling requirements on AT&T's long distance network),[1] the Bell System persisted in its evasions by

[1] *See, e.g., In re Bell System Tariff Offerings of Local Distribution Facilities*, 46 F.C.C.2d 413 (1974); *In re Proposals for New or Revised Classes of Interstate and Foreign Message Toll Tel. Serv.*, 56 F.C.C.2d 593, 599-613 (1975); *In re Proposal for New or Revised Classes of Interstate and Foreign Message Toll Tel. Serv.*, 58 F.C.C.2d 736 (1976); *In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities*, 60 F.C.C.2d 261 (1976); *In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Pub. Switched Network Servs.*, 83 F.C.C.2d 167 (1980); *In re Restrictions on Interconnection*, 60 F.C.C.2d 939 (1976); *In re MTS and WATS Markets Structure*, 81 F.C.C.2d 177 (1980); *In re American Tel. & Tel. Co. and Bell Sys. Operating Cos. Tariff*, 90 F.C.C.2d 202 (1982).

"commit[ing] a number of anticompetitive acts" that the FCC left unremedied. H. Rep. at 58.

Regulation's inability to overcome the Bell monopoly prompted antitrust litigation. *See AT&T Corp.*, 525 U.S. at 413 (recounting history); *United States v. American Tel. & Tel.*, 552 F. Supp. 131, 160-70 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). MCI sued, claiming that even after the FCC required Bell to interconnect its local networks with long distance competitors, Bell continued to refuse to provide the interconnection necessary for MCI to compete effectively. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1131-35 (7th Cir. 1983) ("*MCI*"). Moreover, when Bell eventually acceded to interconnection for a limited number of MCI services, it insisted that MCI interconnect in a manner that increased MCI's costs and decreased the reliability of its service. *Id.* at 1150-51. Bell also failed to provide repair procedures appropriate for wholesalers, providing only procedures ordinarily used by retail customers. *Id.* at 1151-52. Based on this evidence, a jury found a violation of Section 2 of the Sherman Act. The Seventh Circuit affirmed, relying on this Court's decisions in *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). *See MCI*, 708 F.2d at 1132.

At about the same time, the Second Circuit upheld a jury verdict finding that the Bell System's parallel efforts to limit interconnection of non-Bell telephone equipment violated

Section 2. *Litton Sys.*, 700 F.2d at 811. Even after the FCC required the Bell System to permit such interconnection, Bell sabotaged competition by requiring customers to pay substantial fees for an interface device before they could connect their equipment to the network, making it difficult for customers to obtain the device, and delaying "cutovers – the final step involved in switching from AT&T to non-AT&T equipment." *Id.* at 811, 815. Bell required the network interface device even though "its own people thought that the device was a redundant 'artificial barrier' to competition" and even though it knew that the FCC would eventually forbid the device's use. *Id.*; *see also id.* at 798-802, 814. Bell hoped, however, to delay regulatory action and thereby maintain its control over the retail market.

The United States brought its own enforcement action, contending that the Bell System was using its monopoly control over the local network to obstruct competition in the long distance and equipment markets. H. Rep. at 47. The government presented evidence showing that Bell initially refused to deal with potential long distance competitors altogether. After FCC regulations required interconnection, Bell strung competitors along in negotiations by raising "groundless technical objections," persisted in denying interconnection that had the best technical properties, provided inferior repair procedures, and engaged in other exclusionary practices. *AT&T*, 524 F. Supp. at 1354-57; *Antitrust Revolution*, *supra*, at 304-05. The government presented similar evidence with respect to equipment. The government maintained that the Bell System's desire to maintain its retail "revenues and market position" by increasing rivals' costs and delaying their ability to interconnect was not an acceptable justification for this anticompetitive conduct. *AT&T*, 524 F. Supp. at 1349-51.

Denying a motion for judgment at the close of the government's case, the court concluded that, if unrebutted, the government's evidence established a Section 2 violation, because "[a]ny company which controls an 'essential facility' or a 'strategic bottleneck' in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them." *Id.* at 1352-53. The court rejected the argument that antitrust liability would interfere with the FCC's regulatory scheme, explaining that the regulations did not "require[] or encourage[]" anticompetitive actions by Bell and served a purpose consistent with that of the antitrust laws. *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1328 (D.D.C. 1978).

Long distance and equipment competition took root as a result of these antitrust actions. The private cases – including some 35 private antitrust actions that had been filed by the time the government commenced its action in 1974 – deterred continuing anticompetitive conduct, and the government's case resulted in a 1982 consent decree ("MFJ") that divested from AT&T the incumbent local exchange carriers (which controlled local services on a regional basis), and barred those companies from entering the markets for long distance, equipment manufacturing, and other services. *See AT&T*, 552 F. Supp. at 131. Competition soon led to a "steep" decrease in AT&T's market shares in long distance service and equipment manufacturing, a "striking" decline in price, and an "unprecedented degree of innovation." H. Rep. at 56; *see also In re Policy and Rules Concerning Rates for Dominant Carriers*, 4 F.C.C.R. 2873, ¶ 26 (1989); *Federal Telecommunications Law*, *supra*, at 533-34.

B. The 1996 Act.

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 251-276 ("the 1996 Act"), Congress sought to translate the access obligations that created long distance and equipment competition into comparable access obligations for the local exchange market. *Verizon*, 535 U.S. at 487.

To allow competition to exist at all, Congress preempted state monopoly franchise laws and similar legal barriers to local competition. 47 U.S.C. § 253. Congress then turned to the biggest hurdle: encouraging competition in the face of the incumbents' control of the existing local network, which was the product of nearly a century of state-protected monopoly. Congress recognized that competition had developed in the long distance market through a combination of leasing and facilities-based competition, and structured the 1996 Act accordingly. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, ¶ 12 (1996) ("*Local Competition Order*"). Under § 251(c) of the Act, a would-be local competitor – including, for instance, the post-divestiture AT&T – "can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network." *AT&T Corp.*, 525 U.S. at 371; *see also Verizon*, 535 U.S. at 491-92.

The Act gave the FCC authority to oversee this regulatory regime, including the Act's unbundling requirements, which were designed to provide entrants with use of "facilities that are very expensive to duplicate (say,

loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)." *Verizon*, 535 U.S. at 510 n.27. Analogizing to the access obligations required by the FCC and the MFJ for the long-distance markets, *Local Competition Order* ¶ 520, the FCC ordered unbundling of local loops, switching and transport, and required incumbents to allow competitors to order, provision, bill, and perform maintenance and repair in "substantially the same time and manner that an incumbent can for itself," *id.* ¶ 518.

The Act also authorized the FCC to establish the methodology for setting rates for leasing of unbundled elements. *See* 47 U.S.C. §§ 251(c)(2)-(3), 252(d)(1). The FCC concluded that these rates should be based on "Total Element Long Run Incremental Cost" ("TELRIC"), which calculates the rate for network elements on the basis of what it would cost to provide the functions the element provides efficiently using up-to-date technology. *Verizon*, 535 U.S. at 495-96. Because TELRIC "should produce rates for monopoly elements and services that approximate what the incumbent LECs would be able to charge if there were a competitive market for such offerings," TELRIC enables incumbents "to recover a fair return on their investment" – including a reasonable profit. *Local Competition Order* ¶ 738.

In Section 271 of the 1996 Act, Congress authorized BOCs to provide in-region long-distance service once they satisfied (on a state-by-state basis) a "competitive checklist." *See* 47 U.S.C. § 271(c). Foremost among the checklist requirements are the obligations to offer interconnection and nondiscriminatory access to network elements in accordance with the 1996 Act's local competition provisions.

Congress was well aware, however, of the "inherent . . . limitations" of regulation, and of the role of antitrust suits in creating long distance and telephone equipment competition. *See, e.g.*, H. Rep. at 57-58; *see also* 142 Cong. Rec. H1145 (daily ed. Feb. 1, 1996) (statement of Rep. Conyers) ("[T]his legislation would not be possible had the Justice Department not broken up the old Bell monopoly in 1984. . . . [B]y maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers."). The 1996 Act thus includes an antitrust savings clause making explicit that "*nothing* in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 1996 Act, 110 Stat. 56, 143, § 601(b)(1) (codified at 47 U.S.C. § 152 note) (emphasis added); *see also* 142 Cong. Rec. S687 (daily ed. Feb. 1, 1996).[2]

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[2] *See, e.g.*, S. Rep. No. 104-23, at 17 (1995) ("[T]he provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill."); Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, at 201 (1996) (the savings clause "prevents affected parties from asserting that the bill impliedly preempts other laws"); 141 Cong. Rec. S8154 (daily ed. June 12, 1995) (statement of Sen. Hollings) ("Section 2 of the Sherman Antitrust Act is untouched, absolutely untouched"); 142 Cong. Rec. S687 (daily ed. Feb. 1, 1996) (statement of Sen. Thurmond) ("The second important antitrust issue in this legislation is the unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Today we take for granted that the antitrust laws apply to the communications sector. . . . Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation it fosters, can flourish to benefit consumers and the economy."); 141 Cong. Rec. S18586 (daily ed. Dec. 14, 1995) (statement of Sen. Leahy) ("I firmly believe that we must rely on the bipartisan principles of antitrust law in order to move as quickly as possible toward competition in all segments of the telecommunications industry, and away from regulation. Relying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry.").

C. The Incumbents' Anticompetitive Conduct Since The 1996 Act.

When the 1996 Act was passed, the hope was that the incumbents would swiftly comply with local competition requirements in order to obtain Section 271 authorization to provide long distance service, as Congress contemplated. The reality has been different. Like AT&T before them, the incumbents aggressively resisted competition on the merits, waging trench warfare in courts and agencies across the country to block implementation of the Act's requirements, and using a variety of time-tested stratagems to deny competitors the access promised by the Act. At the same time, the incumbents aggressively sought Section 271 approval to provide long distance service. In rejecting the first five Section 271 applications, the FCC found that the incumbents rejected a high percentage of competitors' orders (thus forcing competitors to submit the orders multiple times), delayed provisioning of competitors' orders, modified the requested due dates on those orders, failed to inform competitors of the status of their orders, and provided inaccurate wholesale bills.[3] State commissions have made similar findings.[4]

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[3] *See, e.g., In re Application of Ameritech Michigan*, 12 F.C.C.R. 20543, ¶¶ 172-221 (1997); *In re Application of BellSouth Corp. (South Carolina)*, 13 F.C.C.R. 539, ¶¶ 82-181 (1997); *In re Application by BellSouth Corp. (Louisiana)*, 13 F.C.C.R. 6245, ¶¶ 20-58 (1998).

[4] *Joint Petition of Nextlink Pennsylvania, Inc. et al.*, Docket No. P-00991648 at 219 (Pa. Pub. Util. Comm'n, Aug. 26, 1999) (documenting "numerous examples where [Verizon] has abused its market power by providing competitors with less than comparable access to its network or engaged in other discriminatory conduct that prevented [Verizon] customers from switching to a competitor"); *see also, e.g., In re*

Even after the FCC granted its first Section 271 application in 1999, BOCs were forced to withdraw nine subsequent applications (for sixteen States) in response to evidence demonstrating anticompetitive practices like those that led to the rejection of the first five applications.[5] As recently as April 2003, SBC withdrew its application for Section 271 authority in Michigan because it had overbilled competitors by millions of dollars. *See, e.g.*, Charles E. Ramirez, *SBC Puts Long Distance on Hold*, Detroit News, Apr. 17, 2003, at E01. And while the incumbents for the most part have now taken the minimal steps necessary to convince the FCC to grant them Section 271 approval, this has served only to remove the primary incentive provided by the Act for compliance with the Act's local competition obligations. In fact, just months after obtaining approval in New York, Verizon entered a consent decree in which it agreed to pay $3 million to the U.S. Treasury and $10 million to competitors as a result of the discriminatory treatment it provided competitors. Pet. App. 5a. Although Verizon downplays this incident, Verizon Br. 6, the reality is that Verizon "lost" hundreds of thousands of competitors'

Application and Complaint of WorldCom Techs. Inc. Against Ameritech Michigan, Case No. U-12072 (Mich. Pub. Serv. Comm'n, Mar. 3, 2000) (finding that Ameritech denied WorldCom access to unbundled transport in bad faith, which was anticompetitive and discriminatory).

[5] *See, e.g., In re Application by Qwest Multi-State Application to Provide In-Region, InterLATA Services*, Order, DA-02-2230 (FCC rel. Sept. 10, 2002) (terminating Qwest application based on letter of withdrawal); *In re Application of Verizon New England Inc., et al. to Provide In-Region InterLATA Services in Massachusetts*, Order, DA-00-2851 (FCC rel. Dec. 18, 2000) (terminating Verizon application based on letter of withdrawal); News Release, FCC, *Statement of FCC Chairman Michael Powell on Withdrawal of BellSouth 271 Application* (Dec. 20, 2001) (noting BellSouth withdrawal based on questions regarding adequacy of operational support systems and data integrity).

orders over a period of several months and was therefore unable to process, or even inform competitors of the status of, those orders.

As the FCC Chairman explained to Congress, competitors "may have been stymied by practices of incumbent local exchange carriers that appear designed to slow the development of local competition."[6] Indeed, Verizon continues to resist competitive entry by carriers seeking to compete entirely with their own facilities, or seeking to lease unbundled loops from Verizon and combine those with their own facilities. The FCC recently concluded that Verizon had unreasonably delayed by months the interconnection of a competitive provider, Core Communications, and had failed even to inform this new entrant that the delay would occur or when the delay would be resolved, thereby frustrating its business plans and preventing it from serving customers on the facilities it had already built. *In re Core Communications, Inc. v. Verizon Maryland Inc.*, File No. EB-01-MD-007, FCC 03-96 (FCC rel. Apr. 23, 2003). The FCC has also investigated Verizon's failure to provide competitors with reasonable access to the collocation space competitors need to connect Verizon's loops to their own switches and transport facilities. *In re Verizon Communications, Inc.*, 16 F.C.C.R. 16270 (2001) (consent decree in which Verizon agreed to pay $77,000); *In re GTE Service Corp.*, 15 F.C.C.R. 13946 (2000) (consent decree in which GTE agreed to pay $2,700,000).

Notwithstanding the FCC's recognition of the problem, regulatory agencies have been unable to ensure that

[6] News Release, FCC, *FCC Chairman Powell Recommends Increased FCC Enforcement Powers for Local Telephone Competition* (May 7, 2001).

incumbents provide reasonable access to the facilities competitors need in the local market. FCC enforcement is sporadic, with complaints languishing, and the prospect that the FCC would actually withdraw Section 271 long distance authority is far too speculative to provide any meaningful deterrence. *See, e.g.*, Joel I. Klein, *The Race for Local Competition: A Long Distance Run, Not a Sprint* 6-7 (Nov. 5, 1997) ("As for 'sticks,' there are real questions at this point; the Act itself calls for no real penalties for non-compliance . . . ."); Philip J. Weiser, Goldwasser, *The Telecomm Act, and Reflections on Antitrust Remedies*, 55 Admin. L. Rev. 1, 8 (2003). The FCC Chairman has noted that FCC authority is "insufficient to punish and to deter violations in many instances," particularly given "the vast resources" of the incumbents. *See supra* n.6. Indeed, FCC fines are a mere "cost of doing business" for carriers earning billions per year. *FCC Chairman Michael K. Powell: Agenda and Plans for Reform of the FCC: Hearing Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce*, 107th Cong. 17, 60-61 (Mar. 29, 2001) (testimony of Chairman Powell); *see also id.* (noting that fines are "trivial" and enforcement tools are "inadequate with billion dollar industries").

Thus, seven years after passage of the 1996 Act, competitors serve only 13.2% of the lines in the country, and only 10.2% of the residential and small business lines.[7]

[7] *See* News Release, FCC, *Local Telephone Competition: Status as of December 31, 2002* at 1 (June 12, 2003) ("*Local Telephone Competition*"). Verizon boasts that competitors have achieved a 25% market share in New York, Verizon Br. 5, but New York remains an extremely concentrated market by any measure, and competitors have been more successful in New York than in any other state. *Local Telephone Competition* at table 6. Even in New York, competitive gains have stalled. After increasing from 9% to 23% between year-end 1999 and June 30, 2001, competitors' market shares increased only to 25% by December 31, 2001, and did not increase at all in 2002. *Id.* at tables 6, 7.

D. Antitrust Litigation Since The 1996 Act.

Once again, the inherent limitations of the regulatory regime have spurred antitrust litigation. Competitors across the country have brought antitrust actions challenging the incumbents' efforts to obstruct competitive entry into local markets. Contrary to Verizon's suggestion here, these cases do not involve claims by competitors who merely seek to "resell" incumbent services. For example, Cavalier, a Verizon competitor in Virginia, challenged Verizon's baseless refusal to interconnect its own network with the facilities-based network of switches and transport facilities Cavalier had constructed, Verizon's multifarious efforts to prevent Cavalier from leasing local loops to connect with Cavalier's network, and Verizon's efforts to sabotage the process of transferring subscribers to Cavalier's network. *See* Complaint, *Cavalier Tel., LLC v. Verizon Va. Inc.*, Civ. A. No. 03:01CV736 (E.D. Va. filed Nov. 1, 2001). Other competitive carriers have raised nearly identical claims about Verizon and other incumbents. *See, e.g., Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3640 (U.S. Mar. 20, 2003) (No. 02-1423); *MetroNet Servs. Corp. v. US West Communications*, 329 F.3d 986 (9th Cir. 2003). Consumers have likewise sued, challenging the poor service and inflated prices in local markets that have resulted from the anticompetitive conduct of Verizon and the other incumbents.

E. The Proceedings In This Case.

Trinko was a local customer of AT&T in New York who received inferior service and, at times, no service at all, as a result of Verizon's anticompetitive actions. On behalf of itself and other customers of competitive local exchange carriers ("CLECs") in the Verizon region (except for former GTE territory), Trinko brought this antitrust action alleging that Verizon "engaged in exclusionary and anticompetitive behavior by, *inter alia*, attempting to exclude or reduce the market share of rivals in the Local Phone Service on a basis other than efficiency." Am. Compl. ¶ 52, JA46. Among other things, the amended complaint alleged that Verizon "has not afforded CLECs access to the local loop on a par with its own access." *Id.* ¶ 21, JA39; *see also id.* ¶ 24, JA40. Trinko also alleged that Verizon "has filled orders of CLEC customers [only] after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers . . . , and has systematically failed to inform CLECs of the status of their customers' orders." *Id.* ¶ 21, JA39; *see also id.* ¶ 54, JA46. Trinko further explained that Verizon acted with "no valid business reason." *Id.* ¶ 57, JA47. Although the amended complaint cited Verizon's mishandling of orders in New York that led to Verizon's March 9, 2000 consent decree with the FCC as one example of that misconduct, *see id.* ¶ 22, JA40, the allegations extend to States throughout Verizon's region and cover a wide range of anticompetitive conduct. Trinko alleged that, as a result of Verizon's conduct, consumers have been injured "in their business and property interests," and that overall competition in the market was diminished. *Id.* ¶¶ 58-59, JA47-48.

The district court dismissed Trinko's case on the theory that the antitrust laws do not impose on a monopolist the

duty to deal with its competitors. The Second Circuit reversed, relying on precedent of this Court holding that the right to refuse to deal with competitors is not unqualified. Pet. App. 28a-29a (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). "For example," the court explained, "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities.'" *Id.* 29a. The court also relied on a monopoly leveraging theory. *Id.* 30a-31a. The court further found that the purposes of the antitrust laws and regulatory requirements were "in synch," and that, at least on a motion to dismiss, "the record does not allow us to conclude that the regulatory process has successfully eliminated the risk of anticompetitive behavior." *Id.* 38a.

SUMMARY OF ARGUMENT

I. Trinko's amended complaint states a claim under Section 2 of the Sherman Act. Trinko alleges that Verizon has monopoly power and is maintaining that power through exclusionary conduct – that is, through conduct that "exclude[s] rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605. The amended complaint specifically alleges that Verizon is denying competitors reasonable access to the local loop and is sabotaging the process of switching customers from Verizon's network to those of its competitors. Trinko also specifically alleges that this conduct excludes AT&T on a basis other than efficiency, and that Verizon lacks any legitimate business justification for its conduct. These allegations easily satisfy Federal Rule of Civil Procedure 8.

Although purporting to challenge the sufficiency of these particular allegations under existing law, Verizon is in reality seeking a radical revision of that law. As Verizon would have it, conduct should be deemed exclusionary for Section

2 purposes only if the monopolist's conduct involves a sacrifice of short-term profits.

II. Whatever its merits in other contexts, the Section 2 standard advocated by Verizon is completely inappropriate in this case because the policy arguments Verizon makes to support it are all inapposite in the present context. Imposing Section 2 liability on Verizon for denying access to the local loop creates no risk of chilling investment and innovation. The local loop is an essential facility that cannot, as a practical matter, be duplicated. Requiring Verizon to provide AT&T access to the loop under Section 2 thus deters no innovation that would otherwise occur. In any event, the 1996 Act already requires Verizon to give competitors access to the loop on terms set by the regulatory regime. Section 2 thus can impose no incremental risk of deterring investment. Enforcing Section 2 here creates no risk of collusion for similar reasons. Nor does Section 2 enforcement create problems of administration. No antitrust court need set and supervise the terms of access because the 1996 Act has created a regulatory regime that is already doing just that.

Longstanding and uncontroversial principles of antitrust law require particular sensitivity to the regulatory milieu in which a monopolist's conduct occurs, thus foreclosing Verizon's contention that the 1996 Act should be ignored in evaluating Trinko's Section 2 claim. Moreover, far from providing a reason to preclude antitrust enforcement, the 1996 Act contains an express instruction that the antitrust laws shall apply to conduct also regulated under the Act.

III. Even apart from the special context of this case, Verizon's unitary "sacrifice" standard is misguided. That standard would immunize all misconduct by a monopolist that obstructs competition, except in the rare instance in

which a monopolist sacrifices short-term profits in the process. Such a sweeping cutback of Section 2 liability finds no support in this Court's precedents, and is unwarranted as a matter of antitrust policy and common sense. If it were adopted, the touchstone under Section 2 would no longer be consumer welfare – it would be the monopolist's welfare. Moreover, the rule makes no more sense in the specific context of refusals to deal than it does generally. And the additional showing of "discrimination" that Verizon proposes for refusal to deal cases would make all of these problems worse.

IV. Trinko has standing. As a consumer in a market Verizon monopolizes, Trinko falls well within the class of persons authorized to sue by the plain terms of Section 4 of the Clayton Act. Moreover, Trinko suffers direct harm to his business or property because his injuries are "inextricably intertwined" with Verizon's antitrust violation. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 (1982). For this reason, and because this case does not involve the pass-through of an overcharge, the exception to standing set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), has no application here.

ARGUMENT

A firm violates Section 2 of the Sherman Act when it possesses monopoly power in a relevant market and maintains that power by engaging in anticompetitive conduct to "'foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-83 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)). As this case comes to the Court, Verizon's principal argument is that Trinko has not alleged the second of these elements –

anticompetitive conduct – sufficiently to survive a motion to dismiss.

Anticompetitive or "exclusionary" conduct is behavior that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits, or does so in an unnecessarily restrictive way." *Aspen*, 472 U.S. at 605 n.32 (quoting III Phililp E. Areeda & Donald F. Turner, *Antitrust Law* 78 (1978)). Conduct is exclusionary if it harms the competitive process; harm to individual competitors does not suffice. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). Conduct is exclusionary in this sense if a monopolist "has been attempting to exclude rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605 (internal quotation marks omitted); *see also, e.g., Kodak*, 504 U.S. at 482-85. The dividing line is between conduct that advances competition's basic goals – lower prices, greater consumer choice, better products, and more efficient production methods – and conduct that obstructs them.

The conduct Trinko alleges in the amended complaint falls well within any reasonable Section 2 definition of exclusionary conduct. To overturn the Second Circuit's decision, Verizon is thus forced to advocate a standard that would drastically revise Section 2. But Verizon's argument is meritless, particularly in light of the 1996 Act and the nature of the facilities at issue – both of which render Verizon's conduct the paradigmatic case for refusal to deal liability.

I. TRINKO'S AMENDED COMPLAINT ALLEGES EXCLUSIONARY CONDUCT UNDER SETTLED SECTION 2 LAW.

Trinko's amended complaint alleges a valid cause of action under well-established theories of Section 2 liability.

First, the amended complaint alleges facts sufficient to support a "refusal to deal" claim under this Court's Section 2 precedents. Although as a general matter a firm can choose with whom to deal, a monopolist's refusal to deal with a competitor can impermissibly obstruct the goals of competition. That is merely a specific example of the general principle that "[w]here a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws – or that might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist." *Kodak*, 504 U.S. at 487 (Scalia, J., dissenting). Thus, where a monopolist refuses to cooperate with a competitor in a situation where some cooperation is indispensable to effective competition, that conduct can be "exclusionary" in the absence of a "legitimate competitive reason" for the refusal. *Kodak*, 504 U.S. at 483 n.32; *see also Aspen*, 472 U.S. at 603; *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986).

That a monopolist can violate Section 2 by refusing to deal with competitors has been settled law for the better part of a century. *See, e.g., Kodak*, 504 U.S. at 483-86 (refusal by manufacturer of photocopiers to sell parts to competitors in the market for servicing those copiers); *Aspen*, 472 U.S. at 601 (refusal to sell a multi-area ski ticket in cooperation with competitor); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (refusal to sell power at wholesale or transmit

power over defendant's lines to its rivals in the retail market); *Lorain Journal Co. v. United States*, 342 U.S. 143, 154-55 (1951); *Eastern Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (refusal to sell "photographic materials" at wholesale prices to retail competitor); *see also, e.g., United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).[8]

Second, Trinko's amended complaint alleges facts sufficient to support an "essential facilities" claim under legal standards that have been uniformly recognized by the courts of appeals.[9] An "essential facility" is a facility competitors cannot reasonably duplicate and to which they need access in order to have an opportunity to compete at all.

The essential facilities analysis applied in the circuits generally, and followed by the Second Circuit in this case, Pet. App. 29a-30a, is set forth in *MCI*. That case upheld a jury verdict that AT&T violated Section 2 by unlawfully refusing (or effectively refusing) to interconnect MCI, which sought to provide long-distance service, "with the local distribution facilities of Bell operating companies." *MCI*, 708 F.2d at 1132-33; *see also supra* p.5. The *MCI* court

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[8] Contrary to Verizon's contention, the fact that *Terminal Railroad* involved concerted action was not central to the Court's Section 2 holding, *see* 224 U.S. at 409; rather, the decision turned on the essentiality of the facilities that the defendants controlled, *see id.* at 397, 405 (explaining that the "geographical and topographical situation" requiring competitors to use defendants' facilities was "most extraordinary," and that the Court based its "conclusion . . . , in large measure, on that fact").

[9] *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 & n.44 (D.C. Cir. 1977); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Covad*, 299 F.3d at 1285–88; *see also* Robert Pitofsky *et al.*, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 Antitrust L.J. 443, 448-49 & nn.23-24 (2002) (collecting cases).

identified four elements that a plaintiff would have to establish as a prerequisite to finding Section 2 liability: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Id.*; *see also AT&T*, 524 F. Supp. at 1352-53. The four-prong test is not divorced from the general requirements of Section 2, but simply recognizes the fact of essentiality as "helpful" in identifying circumstances in which a refusal to deal is most likely to contribute to maintenance of monopoly power. US Br. 21-22. Denial of the essential facility must substantially harm the competitive process, and must lack a legitimate business justification.

Although the "essential facilities" doctrine has been criticized on the ground that it may (if not rigorously applied) reach further than Section 2 properly should, even its detractors have recognized that the Seventh Circuit's *MCI* decision was correct, *see* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 n.21 (1989), and that the doctrine is properly applied in a regulated industry in which the facility (of which the local loop is the paradigmatic example) simply cannot be duplicated but can be used to shut down completely any competition in what would otherwise be a viably competitive market. *See, e.g.*, IIIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 771c, at 173, ¶ 773a, at 196, ¶ 773b, at 199, ¶ 787c, at 310 (2d ed. 2002) ("Areeda") (explaining that the essential facilities doctrine is arguably appropriate in the context of a natural or regulated monopoly, such as hard-wired local telephone service).

Trinko's amended complaint states a claim under this settled law.[10] The complaint's allegations must be taken as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), and must be construed "in favor of the complaining party." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979). The amended complaint gives Verizon fair notice of the basis of each element of Trinko's case, and alleges a course of exclusionary conduct that would be rational for a monopolist in Verizon's position to undertake. *Cf. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Specifically, Trinko alleges that Verizon used its monopoly power in the local phone service market, *see* Am. Compl. ¶¶ 50, 56, JA45, 47, to block competitors' access to the local loop – thereby adversely affecting service to the competitors' customers – by, "[a]mong other things," failing to "fill in a timely manner, or not at all, a substantial number of orders for CLEC customers." *Id.* ¶ 21, JA39; *see also id.* ¶¶ 22, 54, JA40, 54-

[10] The amended complaint also states a claim under monopoly leveraging doctrine, which prohibits a monopolist from "exploit[ing] his dominant position in one market to expand his empire into the next." *Kodak*, 504 U.S. at 479 n.29 (quoting *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611 (1953)). Verizon attacks the Second Circuit for permitting a finding of liability under this doctrine absent an attempt to monopolize or actual monopolization of the retail market. But while it is true that there is disagreement among the Circuits on whether mere "competitive advantage" in the second market is sufficient to state a Section 2 claim, *see, e.g., Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001), that disagreement is not implicated here. Trinko alleges that Verizon has leveraged its power over the regulated market for the local loop to maintain a full-fledged monopoly in the retail local service market. *See* US Br. 26 n.12. No more is required in order to state a claim. *See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *United States v. Griffith*, 334 U.S. 100, 107 (1948); III Areeda, *supra*, ¶ 652a, at 90, ¶ 652c, at 95-97; IIIA *id.* ¶ 787b, at 296-98.

55. Trinko also alleges that Verizon was willing to suffer the short-term cost of regulatory penalties, *see id.* ¶ 22, JA40, in order to further Verizon's long-term "inten[t] to enhance or maintain its dominant position in the market for local phone service in the region," *id.* ¶ 2, JA35; *see also id.* ¶¶ 1, 40, 58, JA34-35, 43-44, 47. Indeed, the amended complaint specifically alleges that Verizon attempted to exclude rivals "on a basis other than efficiency," *id.* ¶ 52, JA46, and without any "valid business reason," *id.* ¶ 57, JA47; *see also id.* ¶¶ 33(b), 53, 54-56, 58, JA42, 46-47. It also alleges that Verizon's competitors cannot meaningfully compete without access to the local loop and cannot duplicate it, and that Verizon has denied reasonable access to the loop in circumstances in which (as a result of the 1996 Act) access is not merely feasible but mandatory. *Id.* ¶¶ 2-21, 24, 48, 51, 54, JA35-40, 45-47.

As these allegations make plain, there is no basis for the contention advanced by Verizon and the Department of Justice ("DOJ") that Trinko's amended complaint fails to plead – or that the Second Circuit excused Trinko from the need to plead – exclusionary conduct. The amended complaint alleges in plain English that Verizon sought to exclude rivals on some basis other than efficiency. *See Aspen*, 472 U.S. at 605; *Kodak*, 504 U.S. at 482-85. It likewise alleges that Verizon lacked a legitimate business justification. Thus, irrespective of whether Trinko's allegations are understood as a general "refusal to deal" claim or a specific "essential facilities" claim, Trinko has alleged that Verizon's conduct was exclusionary in precisely the sense Section 2 requires.

No more is needed to satisfy Federal Rule of Civil Procedure 8, which requires only a "short and plain statement showing that the pleader is entitled to relief." Fed.

R. Civ. P. 8. Rule 8 means what it says. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). A plaintiff is not required "to set out in detail the facts upon which he bases his claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Rather, in deciding the Rule 12(b)(6) motion presently before the Court, the question is whether "relief could be granted under *any set of facts that could be proved* consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (emphasis added) (internal quotation marks omitted). "This rule applies with no less force to a Sherman Act claim." *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980). The amended complaint easily satisfies Rule 8.

Nor is there a deficiency in the allegation that Verizon's conduct lacks a legitimate business justification. *See* US Br. 28-30. Whether such a justification exists is a question of fact, and Trinko cannot be required to anticipate in a complaint business justifications that Verizon might conceivably advance. *See Kodak*, 504 U.S. at 483 n.32; *Aspen*, 472 U.S. at 608; *cf. Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746-47 (1976). The arguments put forth by Verizon and the United States are thus simply inappropriate efforts to engraft onto Rule 8 heightened pleading requirements for monopolization cases.

Faced with these insuperable obstacles under existing law, Verizon (supported in part by DOJ) launches a frontal assault on the very idea that a monopolist's refusal to deal with a competitor can be a basis for imposing Section 2 liability. Although not so bold as to call for *per se* Section 2 immunity for all refusals to deal, Verizon advocates a test that amounts to much the same thing in practice – a test that would have resulted in a different outcome in this Court's

refusal to deal cases, as well as in the landmark antitrust actions against AT&T. Specifically, Verizon proposes a "sacrifice" test, under which liability obtains only for "conduct [that] makes no business sense except for its enablement of monopoly returns." Verizon Br. 22. Verizon adds the gloss that courts should not even inquire into the possibility of such impermissible sacrifice unless a monopolist discriminates by refusing to deal with a competitor on terms the monopolist offers to noncompetitors. *Id.* 10. Indeed, Verizon goes so far as to suggest that this is what Section 2 law currently requires, and that the "sacrifice" test applies not merely to refusals to deal but to every claim of monopolization.[11] What Verizon's test does not ask is whether a monopolist is "attempting to exclude rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605 (internal quotation marks omitted). Under Verizon's test, it is permissible for a monopolist to exclude rivals on bases other than efficiency, unless the conduct also involves sacrifice as Verizon has defined it.

Verizon supports its test with sweeping theoretical policy arguments. Specifically, Verizon asserts that Section 2 should not impose upon monopolists any duty to cooperate with competitors – even where the monopolist controls an essential facility or where such cooperation is otherwise indispensable to effective competition – because antitrust courts are ill-equipped to decide the terms of such access and to administer the ongoing cooperation that an access obligation would require. Verizon also contends that

[11] For its part, DOJ acknowledges the reality that the usual test under Section 2 is whether the "harm to competition [is] disproportionate to consumer benefits . . . and to the economic benefits to the defendant." US Br. 14. DOJ does not advocate wholesale revision of that standard. It advances the narrower proposition that the "sacrifice" test should apply in refusal to deal cases. *Id.* 15-17.

imposing such duties risks chilling innovation both by the monopolist (who may be forced to share the fruits of innovation) and by the competitor (who may see no need to innovate), creates additional risks of collusion between the monopolist and its rivals, and imposes significant costs. For these reasons, Verizon concludes, a monopolist should be free to decide whether to deal with competitors, and competition should proceed only if it can do so through independent action rather than cooperation.

These abstract arguments for cutting back Section 2 law lack force generally (as will be shown in Point III *infra*), but there is no reason for the Court to consider them because they have no relevance whatsoever in *this* case. As will be shown in Point II *infra*, two critical features make this case a singularly inappropriate one for adopting Verizon's proposal. First, Verizon's competitors have been denied access to what is indisputably an essential facility under even the most narrowly drawn understanding of the concept. Because there can be no meaningful competition unless competitors have access to the local loop, it makes no sense to insist that the antitrust laws should encourage competition without any cooperation in this context. Second, under the regulatory regime put in place by the 1996 Act, access to the local loop and the terms of that access are mandated by law. Thus, Verizon cannot have a legitimate business justification for unreasonably denying or sabotaging access to the loop, and Verizon's policy arguments against an access requirement necessarily contravene judgments Congress has already made, or are mooted by Congress's judgments.

II. SECTION 2 PROVIDES A REMEDY WHEN A MONOPOLIST DENIES A COMPETITOR ACCESS TO AN ESSENTIAL FACILITY IN CIRCUMSTANCES IN WHICH AN EXISTING REGULATORY REGIME REQUIRES SUCH ACCESS.

A. The Policy Arguments Advanced By Verizon For Limiting Section 2 Liability Are Inapposite.

The most glaring flaw in Verizon's argument is that none of the purported "problems" offered as justifications for adopting its truncated Section 2 standard exist in the present context. Indeed, every one of Verizon's arguments is rendered irrelevant by the fact that this case involves an essential facility and that it arises in the regulatory milieu of the 1996 Act: here, there is no risk of deterring investment in innovation by competitors or incumbents; there is no risk of inappropriate collusion; and there are no problems of administering the terms of access to the local loop. Whatever its merits in other contexts, Verizon's proposed focus on "sacrifice" and "discrimination" would perversely serve to defeat the objectives of the Sherman Act here.

No risk of deterring innovation. The contention that any requirement of forced cooperation will deter innovation has no force here, for two reasons. First, that risk is "insubstantial in the case where neither the plaintiff nor anyone else could ever duplicate the claimed input in any effective way." IIIA Areeda, *supra*, ¶ 771b, at 172-73. As Trinko alleges, it is not feasible for competitors to reproduce the local loop. *See* Am. Compl. ¶¶ 19-20, 24, 48, 51, JA39, 40, 45-46; *see also MCI*, 708 F.2d at 1132-33. Moreover, the interconnection required by the *AT&T* antitrust case did not deter investment but rather spurred aggressive innovation

that greatly benefited consumers. *See supra* p. 7.[12] Second, the 1996 Act already requires access to the local loop and mandates compensation to the incumbents for the costs of providing it. Congress has thus already made the judgment that the risks Verizon speculates about here are not a sufficient reason to preclude access. *See Verizon*, 535 U.S. at 475, 516-17 (rejecting similar challenge to FCC method for setting rates for leasing the local loop). Enforcing the antitrust laws will result in no incremental deterrence, because forced sharing has already been imposed by the 1996 Act.

No risk of collusion. For the same reasons, enforcing Section 2 in this context presents no risk of collusion between competitors. "Collusion risks are presumably insubstantial when the plaintiff cannot compete in the market at all unless given access to the claimed facility." IIIA Areeda, *supra*, ¶ 772c, at 191; *see generally MCI*, 708 F.2d at 1132-34. In all events, the cooperation required by the 1996 Act can hardly be said to be impermissible collusion. To the contrary, it is what makes competition possible. Nor does it make sense to describe Section 2 as imposing on Verizon an obligation to convert itself from a retailer to a wholesaler. To the extent such an obligation exists, it results from the 1996 Act; antitrust analysis simply takes as a fact of market life Verizon's dual role resulting from that Act. Moreover, Verizon is obliged to provide wholesale facilities used to serve a particular customer only if it fails to compete successfully for that customer in its role as retailer.

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[12] Similarly, access to the loop provides an incentive for both the incumbent and its competitors to develop downstream facilities, which would be useless without such access. It also produces an incentive for competitors to use existing facilities in new and innovative ways. *Cf. Verizon*, 535 U.S. at 516-17.

No problems of administration. Verizon's concern about the administrability of any sharing regime likewise lacks force in this context. No antitrust court need superintend the terms of competitors' access to the local loop, or set the price for such access. Regulatory authorities already do that pursuant to the 1996 Act. In this respect, the present case is like *Otter Tail*, where the Court enjoined Otter Tail from refusing to sell or wheel power to municipalities, but provided that power need only be furnished on "terms and conditions which are filed with and subject to approval by the Federal Power Commission." 410 U.S. at 375.[13]

Inconsistency with the Sherman Act's objectives. Focusing the Section 2 analysis on whether the monopolist "sacrificed" short-term profits and "discriminated" against a rival is counterproductive in the present context. The ostensible purpose of Verizon's test is to ascertain when refusals to deal might lack a legitimate business purpose. Verizon Br. 11. Certainly, the sacrifice of short-term profits and discrimination against rivals are powerful evidence of exclusionary conduct. But they are not indispensible even

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[13] To be sure, as the Second Circuit recognized, a conflict between the 1996 Act and the Sherman Act is theoretically possible. But any potential conflict can and should be addressed at the remedy stage, not on a motion to dismiss, *see* Pet. App. 38a-39a, at which point courts can craft remedies that avoid conflict with the agency goals and regulations, "exercis[ing] their discretion with restraint . . . , consistent with respect for the overarching regulatory regime that Congress has created," *id.* 39a; *accord Otter Tail*, 410 U.S. at 377 ("It will be time enough to consider whether the antitrust remedy may override the power of the Commission under § 202(b) as, if, and when the Commission denies interconnection and the District Court nevertheless undertakes to direct it. At present, there is only a potential conflict, not a present concrete case or controversy concerning it.").

without the 1996 Act, and they are hardly necessary here because the 1996 Act already requires access to the local loop and effective interconnection, and Verizon is violating those obligations. Whatever the status of such actions in a world without the 1996 Act, conduct by an incumbent that violates the Act or obstructs its core objectives cannot be said to have a "legitimate business purpose" – even when the monopolist might be maximizing its short-term profits by sabotaging the competitive entry the 1996 Act seeks to enable.[14] *See* ABA Section on Antitrust, *Antitrust Law Developments* 249 (5th ed. 2002) ("[w]here conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find that conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws").[15]

That the 1996 Act limits what Verizon can charge for local loop access does not alter this conclusion. Under Verizon's own definition of exclusionary conduct, a monopolist is liable for refusing to deal if the refusal makes no business sense except by enabling monopoly returns, and freedom to charge rivals unfettered monopoly rates for

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[14] In all events, Verizon's refusal to deal *does* involve a short-term sacrifice. The amended complaint alleges that Verizon assumed the risk of immediate regulatory penalties (and actually received a $13 million fine for but one incident of its egregious misconduct) in order to permit it to sell more services to local telephone customers and keep the CLECs from competing in the local phone market.

[15] This Court has applied that principle repeatedly. *See, e.g., Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 173, 177 (1965). Far from being inapposite (as the United States suggests, US Br. 12 n.3), this principle applies with particular force here because the regulations Verizon is violating have been imposed for the very purpose of promoting competition in Verizon's monopoly market.

access is not a prerequisite to fulfilling that condition. Here, plaintiff is not complaining that Verizon violated the antitrust laws by charging more than regulated rates. Rather, plaintiff is complaining that Verizon violated the antitrust laws by effectively failing to sell to competitors at all – and the fact that Verizon would have been required to charge regulated rates if it had completed the sales cannot insulate Verizon from such a claim. Otherwise, any actions Verizon took to block access to the loop, which must be provided at regulated rates under the 1996 Act, would automatically have a legitimate business justification. This would mean that the antitrust laws would be effectively preempted by the Act, contravening the Act's savings clause. It would also be inconsistent with *Otter Tail*, which upheld a judgment under which the defendant power company was required to sell power to municipalities at wholesale rates, even though it could have obtained higher profits by selling at the retail price in furtherance of its monopoly. *See Otter Tail*, 410 U.S. at 375-76; *Kodak*, 273 U.S. at 369, 375 (finding actionable defendant's "refus[al] to sell the plaintiff its goods at the dealers' discounts," where defendant "would no longer furnish [the goods] except at the retail prices").

That is not to say that violations of the 1996 Act are *ipso facto* violations of Section 2. Far from it. For one thing, to be exclusionary within the meaning of Section 2, conduct must seriously obstruct the competitive process; it must make "a significant contribution to creating or maintaining a monopoly." IIIA Areeda, *supra*, ¶ 651f, at 83-84. With respect to many of the requirements imposed pursuant to the 1996 Act, a monopolist's violation will not rise to that level. For another thing, a monopolist's action must be deliberate to violate the antitrust laws, whereas even inadvertent action might violate the 1996 Act. Moreover, what the amended complaint here alleges, and what the Second Circuit allowed

to go forward, is a claim that Verizon denied access to an *essential facility* – the local loop. By definition, an essential facility is something competitors cannot duplicate and cannot compete without. Although the local loop unquestionably qualifies, that is hardly true about the entire range of leased elements available pursuant to the 1996 Act.

For similar reasons, there is nothing to Verizon's repeated refrain that the competitors' business here is "mere resale" of Verizon's services, and that imposing a Section 2 obligation to cooperate would thus create no genuine competition. Verizon Br. 6, 30. This case is about access to the local loop and nondiscriminatory interconnection, not about reselling Verizon's services. The reality is that AT&T and other competitors often provide competitive service relying principally on their own switches and transport facilities, and rely on leasing the incumbents' local loops because it would be prohibitively expensive and inefficient to duplicate that essential connection to each customer. Denying access to the loop thus does not merely preclude resale – it precludes competition in "the unshared ... portions of the [network where] meaningful competition would likely emerge." *AT&T Corp.*, 525 U.S. at 429 (Breyer J., concurring in part and dissenting in part).[16]

[16] Moreover, even what Verizon is calling resale – the leasing of all elements necessary to provide service – provides significant competitive benefits by leading to innovative marketing of different combinations of features and pricing packages, and by protecting competition in downstream markets, such as the DSL market, as well as the long distance market itself, where competition may soon be threatened now that the Bell companies are again providing long distance service and have the same incentives they once did to leverage their local monopolies into that market.

B. The 1996 Act Cannot Be Ignored In Determining How Section 2 Applies.

Doubtless because Verizon's arguments make so little sense when considered in the context of the 1996 Act's regulatory regime, Verizon seeks to wall off any consideration of the Act. Verizon Br. 16-17. As Verizon would have it, the question before this Court is whether Section 2 would impose a duty on Verizon to grant access to the local loop in the absence of the 1996 Act. The Act enters Verizon's analysis only to confirm antitrust law's irrelevance – on the theory that the 1996 Act "reduces to insignificance any possibility of competitive harm" and provides a fully effective means of redressing any such harm should it arise. *Id.* 37.

The complete separation between antitrust and regulatory analysis proposed by Verizon is fundamentally at odds with settled antitrust law and practice. It is well established that "antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation." IA Areeda, *supra*, ¶ 240c3, at 12. "[T]he impact of regulation must be assessed simply as another fact of market life." *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, J.). Regulatory requirements can sometimes support the conclusion that particular conduct is not exclusionary. *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). But it is equally clear that a monopolist's violation of regulatory requirements – particularly requirements designed to promote competition in situations where some degree of cooperation is needed to make competition possible – can support a finding of monopolization. Indeed, violations of market-opening regulatory requirements formed a critical

part of the factual case in both the private and government antitrust actions brought to end the Bell long distance and equipment monopolies. *See supra* pp. 5-7.

DOJ contends that, whatever the general rule, *see* US Br. 12 n.3, 14 n.4, the savings clause of the 1996 Act forbids considering the Act as part of the antitrust analysis here, *see* US Br. 11. On this view, invoking the 1996 Act to support Section 2 liability impermissibly "modifies" the antitrust law that would exist absent the Act. But what the savings clause actually says is that nothing in the 1996 Act should be construed "to modify, impair, or supercede *the applicability of* the antitrust laws" (emphasis added). That instruction confirms Congress's intent that nothing in the Act should change the fact of the antitrust laws' applicability. The statutory language cannot mean that courts must either disregard the regulatory regime the 1996 Act puts in place or imagine a counterfactual scenario that ignores the changes to the market structure that have resulted from the Act. Indeed, to read the savings clause that way would impermissibly "modify" existing antitrust law because it would remove from the analysis a consideration the antitrust laws make central – the effect of the regulatory regime.

Similarly without merit is Verizon's contention that the mere existence of the 1996 Act obviates any need to enforce the Sherman Act. Verizon does not expressly contend that the 1996 Act repeals Section 2 by implication. Nor could it. The Act's *express* savings clause defeats any argument for *implied* repeal. In any event, an implied repeal requires "a plain repugnancy between the antitrust and regulatory provisions," *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682 (1975) (internal quotation marks omitted), and there is none here.

Abjuring repeal in name, Verizon seeks it in substance, contending that the 1996 Act is (in the words of the Seventh Circuit) "more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field." *Goldwasser v. Ameritech*, 222 F.3d 390, 401 (7th Cir. 2000); *see* Verizon Br. 34-39. That canon of construction is inapposite. Congress has spoken in the statute itself and stated that the antitrust laws continue to apply to precisely the same field the 1996 Act covers. *See Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996) (rejecting application of canon in similar circumstances).

History also disproves Verizon's contention that Section 2 "'add[s] nothing to the oversight already available under the 1996 law.'" Verizon Br. 38 (quoting *Goldwasser*, 222 F.3d at 401). Congress understood that antitrust enforcement – rather than regulation alone – had been critical to breaking the Bell System's long distance and equipment monopolies, and it included the antitrust savings clause precisely because of the inherent limitations of regulation.

Verizon likewise lacks any basis for its claim that enforcing Section 2 will disrupt the regulatory regime. Verizon Br. 38-39. In fact, the relevant actors hold the opposite view. Congress expressed its intention unambiguously in the savings clause, and the FCC, when implementing the 1996 Act, stated explicitly that the 1996 Act and the FCC's regulations did not provide the exclusive remedy for anticompetitive violations of the local competitive provisions. *See Local Competition Order* ¶¶ 124, 129 ("[W]e clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws."); *see also Covad*, 299 F.3d at 1282. The incumbents themselves, including Verizon, sing this tune when it suits

their purposes.[17] Thus, the 1996 Act provides no basis to limit Section 2 liability.

III. VERIZON'S CONSTRICTED DEFINITION OF "EXCLUSIONARY CONDUCT" IS AN UNSOUND INTERPRETATION OF SECTION 2 IN ALL CONTEXTS.

As demonstrated, this case presents no occasion for the Court to consider Verizon's broader arguments about the definition of exclusionary conduct under Section 2. In all events, the arguments are meritless.

As Verizon would have it, a monopolist's conduct should be subject to Section 2 challenge only when it "make[s] no business sense except for its enablement of monopoly returns," Verizon Br. 22 – by which Verizon means that the monopolist must forego short-term profits in pursuit of

[17] To bolster its application for long distance authority under Section 271, for example, BellSouth argued that "[a]ll of the Act's and the Commission's specific statutory and regulatory protections are backed up by federal and state antitrust laws." Brief in Support of Second Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, at 100 (FCC filed July 9, 1998). Verizon itself in its New York application stated that "carriers would of course be able to resort to private remedies under generally applicable statutes, including the treble-damages remedy of the federal antitrust laws." Application by Bell Atlantic New York for Authorization to Provide In-Region, InterLATA Servs. in New York, CC Docket No. 99-295, at 71 (FCC filed Sept. 29, 1999). Moreover, the FCC expressly relied on Bell Atlantic's representations regarding the availability of antitrust remedies when it granted relief. *See In re Application by Bell Atlantic New York*, 15 F.C.C.R. 3953, ¶ 435 (1999) (relying on "remedies associated with antitrust and other legal actions" to force Bell Atlantic to "sustain a high level of service to competing carriers").

maintaining a long-term monopoly. *Id.* 22. For refusal to deal claims, Verizon adds the further requirement that the only situation in which a court need even inquire into the possibility of such impermissible sacrifice is where the monopolist "discriminates" against a competitor by denying the competitor terms and conditions offered to noncompetitor customers. *Id.* 10.

Although Verizon purports to be describing extant Section 2 law, in fact Verizon's test flies in the face of what a unanimous en banc D.C. Circuit recently described as a "century of case law on monopolization" categorizing conduct as exclusionary if the "the anticompetitive harm of the conduct outweighs the procompetitive benefit." *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc); *see also supra* n.11 (citing US Br. 14). As will be shown, Verizon's proposed test defeats antitrust's consumer welfare objectives and lacks any foundation in precedent.

The sacrifice test is unsound. The fundamental problem with Verizon's approach is that it impermissibly shifts the focus from the welfare of the consumer to the welfare of the monopolist. Verizon's explanation of how the test would apply in this case illustrates the point. Verizon contends that, as a matter of law, the conduct alleged by Trinko is not actionable because Verizon makes a greater profit from maintaining its stranglehold on the retail market than it would from leasing access to the local loop and permitting competition. In other words, Verizon contends that because it does not make a sacrifice when it denies reasonable access to the local loop, *as compared with the returns it is presently making in a monopolized retail market*, its conduct is not exclusionary. *See* Verizon Br. 26-27. But that is just a claim that Verizon's conduct is profit-maximizing *because* it excludes rivals from the market.

That standard would immunize a wide range of affirmative misconduct that historically has been, and indisputably should be, subject to Section 2 scrutiny. For example, a monopolist that blocked competitors' access to a market through sham litigation or regulatory proceedings would be immune from antitrust scrutiny because such conduct, though plainly exclusionary, would involve no sacrifice of short-term profits. Indeed, for the same reason, a monopolist could burn down a competitor's factory without any fear of Section 2 exposure. A standard that produces such results is obviously untethered to the consumer welfare principle that is the foundation of the antitrust laws.

It is readily apparent that monopolists can exclude rivals on a basis "other than efficiency" without sacrificing short-term profits. 472 U.S. at 605. In particular, "[r]aising rivals' costs can be a particularly effective method of anticompetitive exclusion. This strategy need not entail sacrificing one's own profits in the short run . . . ." Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209, 224, 230-31 (1986); *see also* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 318-23 (2001); *Microsoft*, 253 F.3d at 60-61 (imposing Section 2 liability for licensing conditions that had the effect of limiting distribution of rival browsers). Verizon's test would foreclose imposing antitrust liability on that basis. Indeed, Verizon's test cuts off Section 2 liability whenever a defendant comes up with any claim, no matter how insubstantial, that it benefits from its conduct apart from the realization of monopoly returns, even if the monopolist's action causes harm to consumers completely

disproportionate to the benefit.[18] Thus, Verizon's proposed sacrifice test would work a radical and manifestly deleterious change in antitrust law.

The "sacrifice" test makes no more sense in the narrower context of refusals to deal and essential facilities cases. To the contrary, had such a test been in place, the antitrust challenges to the Bell System's long distance and equipment monopolies would have failed. In neither situation did the Bell System's refusal to deal reasonably with potential competitors involve a sacrifice of its short-term profits. There – as here – the Bell System's sole objective for refusing to cooperate with its rivals was the desire to hold on to all its customers, and the monopoly profits it made from them, by refusing to cooperate in ways that would facilitate competitive entry.[19]

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[18] Thus, under Verizon's test, "if the exclusionary conduct improves product performance by $5 and also creates barriers to competition that permit the monopolist to raise prices by $50, that conduct nonetheless would not be condemned," because it could not be said that "the sole purpose and effect of the conduct is to exclude and raise barriers to competition." Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and* Microsoft, 7 Geo. Mason L. Rev. 617, 650 (1999).

[19] In this regard, Verizon is wrong that the refusal to deal claim as to which the *MCI* court "rejected liability" – a claim based on AT&T's refusal to provide access to its long-distance facilities ("multipoint service") – is "a claim similar to respondent's." Verizon Br. 42. With respect to that claim, the *MCI* court concluded that the evidence did not demonstrate that access to the facility was essential or that the FCC had required access. *MCI*, 708 F.2d at 1148-49. But Trinko alleges both essentiality and violation of FCC regulation. Trinko's claim is therefore unlike the failed multipoint service claim, but it is virtually identical to the claim that the *MCI* jury and the Seventh Circuit accepted, which was based on AT&T's obstruction of long distance competitors' access to the local network, in violation of federal regulation. *See id.* at 1132; *see also Covad*, 299 F.3d at 1287-88 (rejecting efforts to distinguish *MCI*).

This drastic curtailment of Section 2 liability cannot be supported by an analogy to predatory pricing law. Courts analyzing claims of predatory pricing do focus on whether a monopolist has cut prices below cost solely because of its expectation of later monopoly return. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). But the test is constructed in this way because of the peculiar nature of such claims. *See Matsushita*, 475 U.S. at 589 (noting that "predatory pricing schemes are rarely tried, and even more rarely successful"). Cutting prices generally benefits consumers. Indeed, it is precisely the kind of conduct that antitrust laws are intended to foster. Courts must therefore be "concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition" and harming consumers. *Matsushita*, 475 U.S. at 594.

In sharp contrast, a monopolist's refusal to deal with competitors has no comparable short-term benefits for consumers, and often harms the competitive process. Monopolists can be expected to routinely engage in such exclusionary conduct and can expect such conduct (if unchecked) to succeed. *See* Steven C. Salop & David T. Scheffman, *Recent Advances in the Theory of Industrial Structure: Raising Rivals' Costs*, 73 Am. Econ. Rev. 267, 267 (May 1983). For just such reasons, this Court has already rejected the analogy Verizon presses here. *Kodak*, 504 U.S. at 478-79 (refusing to accept predatory pricing rule because the "alleged conduct – higher service prices and market foreclosure – is facially anticompetitive and exactly the harm that antitrust laws aim to prevent").

The discrimination test is unfounded. The additional "discrimination" hurdle Verizon proposes for refusal to deal cases is also ill-advised. Section 2 is an anti-monopolization statute, not an anti-discrimination statute, and the touchstone is exclusionary conduct, not differential treatment. The massive benefits that consumers have received from the antitrust actions against AT&T in no way turned on whether or not AT&T was engaging in discrimination. Further, a discrimination requirement would have the perverse effect of exempting the most dominant monopolists from the reach of Section 2 liability for refusals to deal. In *Otter Tail*, for example, it was precisely because Otter Tail did not have monopoly control of all retail markets that it was willing to wheel power to the "customers" who served non-monopoly markets. If Otter Tail had controlled retail markets everywhere, as Verizon does, it would have refused to deal everywhere, just as Verizon says it would in the absence of the 1996 Act. But a company should not be able to escape antitrust liability and impose substantial harm on competition and consumers simply because its monopoly is pervasive.

This Court's precedents do not support Verizon's approach. Verizon purports to derive its sacrifice test, as well as its discrimination gloss, from this Court's Section 2 precedents. But no case from this Court has ever held, or even stated, that sacrifice or discrimination are indispensable elements of any showing of exclusionary conduct under Section 2. While their existence is certainly evidence that conduct is exclusionary, their absence hardly proves the contrary. That is why, as the Court explained in *Aspen*, an evaluation of whether conduct is exclusionary must include "the effect of the challenged pattern of conduct on consumers, on [the monopolist's] smaller rival, and on [the monopolist] itself." *Aspen*, 472 U.S. at 605.

Indeed, Verizon's effort to distill a single defining trait for exclusionary conduct is misguided. This Court has been careful to hew to a case-by-case approach to Section 2, guided by the general principles described in *Griffith*, *Aspen*, and other cases and discussed above. These cases did not purport to make any single variable determinative in addressing complex fact patterns and different types of exclusionary conduct. *See Aspen*, 472 U.S. at 605; *Kodak*, 504 U.S. at 467. This contextual approach is consistent with this Court's general disfavor of sweeping, per se antitrust rules, including those that displace the rule of reason in a Section 1 Sherman Act analysis. *See, e.g., California Dentists Ass'n v. FTC*, 526 U.S. 756, 773-75 (1999).

In this regard, Verizon's "sacrifice" test is irreconcilable with *Otter Tail*, in which the monopolist's "refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopoly position." 410 U.S. at 378. The monopolist defended that conduct by contending that "without the weapons which it used, more and more municipalities will turn to public power [to serve retail customers] and Otter Tail will go downhill." *Id.* at 380. The Court refused to accept that argument, explaining that the "promotion of self-interest alone does not . . . immunize otherwise illegal conduct" and that the Sherman Act "assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency." *Id.* at 380-82. The same was true in *Kodak*. 504 U.S. at 485.[20]

[20] Ignoring *Otter Tail* and *Kodak*, Verizon purports to derive its "sacrifice" test almost entirely from *Aspen*. Verizon Br. 21. But *Aspen* is to the contrary. While *Aspen* references the short-term sacrifice involved in that case as *evidence* that the defendant's conduct was exclusionary, it defines exclusionary conduct without reference to such sacrifice. *Aspen*, 473 U.S. at 605.

There is likewise no merit to Verizon's claim that all relevant cases, including *MCI* and *Otter Tail*, involved "discrimination" because in each case "the defendant was already in the business of providing customers what it then denied on the same terms to a competitor." Verizon Br. 17. There is no indication in *Otter Tail* that Otter Tail was discriminating with respect to wholesale facilities (as compared to wheeling), yet its conduct was found to be exclusionary with respect to both. *Otter Tail*, 410 U.S. at 373, 382; *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 56 (D. Minn. 1971) (noting that Otter Tail's business is "almost exclusively retail"). Nor was discrimination referenced in Judge Greene's decision in *AT&T*. *See supra* p. 7. And while Verizon takes out of context a few scattered snippets of the Seventh Circuit's extensive opinion in *MCI* in an attempt to show that the refusal to deal case was really about discrimination between customers, the purported discrimination was never even mentioned in the court's discussion of the pertinent claims. *Compare, e.g., MCI*, 708 F.2d at 1132-43 (discussion of denial of interconnection), *with id.* at 1095, 1159, 1200-03 (discussion of price issues).

Thus, Verizon's sacrifice and discrimination tests should be rejected as incompatible with Section 2.

IV. TRINKO HAS STATUTORY STANDING.

In a perfunctory denouement, Verizon asserts that Trinko lacks "statutory standing." That contention is meritless.

Verizon's burden is a heavy one. "[T]he Sherman Act was enacted to assure customers the benefits of price competition." *See Associated Gen. Contractors of Cal., Inc.*

v. California State Council of Carpenters, 459 U.S. 519, 538 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 486 n.10 (1977). Thus, "[i]n the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting," the Court has applied the treble-damages provision set forth in Section 4 of the Clayton Act, 15 U.S.C. § 15, "in accordance with its plain language and its broad remedial and deterrent objectives." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 (1982). Here, Verizon cannot possibly defeat Trinko's standing because Trinko is a customer in the very market in which Verizon seeks to maintain its monopoly and Trinko is injured directly by that monopolization.

In this regard, Verizon's argument is at odds with *McCready*. There, a group of psychiatrists conspired with an insurance company to cease reimbursing patients for services rendered by psychologists. *Id.* at 486-89 (Rehnquist, J. dissenting). The patients had standing because, as pawns in the psychiatrists' anticompetitive scheme, they were forced to choose between abandoning their chosen medical care practitioner and being reimbursed for their care. *Id.* at 483-84. This case is no different: by forcing consumers such as Trinko to abandon their provider of choice or suffer degraded and overpriced service, Verizon is driving consumers away from AT&T and toward itself. Moreover, the success of Verizon's scheme depends on the harm imposed on consumers like Trinko. Thus, as in *McCready*, Trinko's injuries are "inextricably intertwined" with the antitrust violation, and are "the essential means by which defendants' illegal conduct brings about the ultimate injury to the marketplace." *See* II Areeda, *supra*, ¶ 339f, at 336 (noting that courts have found injury sufficiently direct for standing when it "was not merely a foreseeable consequence

of injury to the [plaintiff], it was the means by which the conspiracy accomplished its illegal object").

In contending that Trinko (unlike the *McCready* plaintiffs) suffered only indirect injury, Verizon confuses directness of transaction with directness of injury. The absence of privity between an antitrust plaintiff and defendant does not mean that the *injury* is indirect. In *Associated General Contractors*, for example, the Court denied standing to unions who claimed that they had been injured when management associations conspired to pressure contractors and builders to hire nonunion subcontractors. The Court stated, however, that the subcontractors *did* suffer a direct injury as a result of the associations' scheme, even though they directly transacted business only with the contractors pressured by the associations, and never with the associations themselves. 459 U.S. at 541-42.[21]

Contrary to Verizon's argument, *Illinois Brick Co. v. Illinois*, 434 U.S. 881 (1977), and *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990), should not be extended to

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[21] *See also In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1168 (3d Cir. 1993) (holding that plaintiff's injury was "undeniably" direct even though plaintiff never transacted business with defendant); *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 294 (2d Cir. 1983) (Friendly, J.) (concluding that injury was direct even though plaintiff was not in privity with defendants, and noting that "[i]njury to Crimpers was precisely the intended consequence of defendants' boycott"). Even under Verizon's crabbed understanding of directness, the amended complaint cannot be dismissed. Trinko and other consumers could recover for Verizon's delay in processing orders and switching customers because, until the orders were processed, the consumers remained with Verizon against their will, thereby being denied the opportunity to receive service from their provider of choice or denied service altogether. *See* Am. Compl. ¶ 21, JA40 (alleging delays in order processing). Some of these consumers are thus direct purchasers even under Verizon's theory, and their standing is thus unquestioned.

deny standing here. Those cases, after all, establish an *exception* to the general rule set forth in the plain language of the Clayton Act that all who have been injured by antitrust violations shall have standing. Neither involved a claim of monopolization or a situation in which the plaintiff was a consumer in the monopolized market. They were overcharge cases, in which the defendants were alleged to have fixed prices and overcharged a customer (the direct purchaser), who in turn passed on a portion of that overcharge to its customers (subsequent indirect purchasers). As *Illinois Brick* recognized, overcharge cases present unique risks of duplicative payments from the defendant to compensate for the same injury. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968), this Court had held that a direct purchaser in an overcharge case can recover from the defendant the full amount of the overcharge, and that the defendant cannot avoid antitrust liability (or reduce antitrust damages) by alleging that the direct purchaser has "passed on" a portion of the overcharge to its customers. In *Illinois Brick*, an overcharge case brought by customers of the direct purchaser, the Court held that such customers lack standing because, in light of *Hanover Shoe*, permitting recovery by an indirect purchaser would allow a double recovery.[22]

This case is fundamentally different. Verizon did not interact with AT&T solely as a supplier, but also as a competitor. Verizon's aim was not to extract monopoly profits by overcharging AT&T for loop access. Verizon sought to force AT&T out of the retail market (or delay, or

[22] In any event, *Illinois Brick* and *UtiliCorp* do not bar claims for injunctive relief. *See, e.g.*, II Areeda, *supra*, ¶ 346d, at 364; *cf.* Pet. App. 2a, 7a (describing Trinko's claims for injunctive relief).

raise the costs of, AT&T's participation in that market) so that Verizon could maintain its monopoly control.

Moreover, Trinko's damages are distinct from those suffered by AT&T, and therefore, the risk of double recovery is not present. Competitors whose entry was hindered suffer lost profits, both because they have fewer customers and because they have higher costs for those customers they retain.[23] Consumers, on the other hand, suffer a loss of choice, degraded service or no service at all, and inflated retail prices.[24] Denying standing to Trinko would allow Verizon to escape liability for the unique antitrust injury it inflicts on consumers. *McCready*, 457 U.S. at 473 n.10 (finding standing in part because "denying standing to McCready and the class she represents would also result in the denial of compensation for injuries resulting from unlawful conduct"). Verizon is thus wrong to suggest that "AT&T and other competitors can be counted on to vindicate

[23] AT&T could recover lost profits for the customers who were prevented from switching to it, as well as customers who left because of Verizon's actions. For its own customers, AT&T would recover profits that were lost as a result of increased costs imposed by Verizon's conduct (such as costs of responding to calls from customers about poor service). AT&T's customers, on the other hand, would recover for the diminished value of their service as a result of its poor quality, as well as any profits they lost as a result of inability to transact business when phone lines were down. *Cf.* II Areeda, *supra*, ¶ 346a, at 360 ("the correct solution is to permit damages actions based on lost profits to all intermediaries and overcharge damages to end-use customers").

[24] *See Iron Ore*, 998 F.2d at 1169 (holding that the injuries at issue "are not the particular kind of double recovery that *Illinois Brick* sought to prevent" because "different parties allege different injuries"); *Crimpers*, 724 F.2d at 294 (holding that a forced boycott case presented no risk of duplicative recovery because the plaintiffs' injuries were distinct).

the law as private attorneys general." Verizon Br. 46 (internal quotation marks omitted).[25]

Nor is there any other justification for denying standing to Trinko. *See generally Associated Gen.*, 459 U.S. at 538-45 (listing and applying numerous factors for statutory standing). Trinko's injury is, for example, of the sort that antitrust law was intended to remedy. *Id.* at 538. Trinko was undeniably a "participant in the relevant market," *id.*, and was a consumer of services "within that area of the economy . . . endangered by [that] breakdown of competitive conditions," *McCready*, 457 U.S. at 480-81.

Finally, contrary to Verizon's suggestion, Verizon Br. 46, the calculation of damages raises no issues beyond the ken of the antitrust courts. To be sure, damages calculations can be complex, but they are calculations that antitrust courts perform routinely, and thus provide no basis for Verizon's proffered restriction on standing here. *See McCready*, 457 U.S. at 475 n.11 ("Difficulty of ascertainment [should not be] confused with right of recovery." (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 267 (1946))).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[25] Amicus argues that Trinko's injury "will not necessarily go uncompensated" because Trinko "could simply sue AT&T for breach of its express or implied contractual obligation." Washington Legal Foundation Br. 5-6. But even if such relief were available (and the record does not suggest that it is), that relief would not substitute for the Clayton Act's treble-damages provisions, which serve deterrent and remedial goals. *Compare Associated Gen.*, 459 U.S. at 541-42.

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Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

Trinko boldly asserts, as it must, that Section 2 requires a monopolist to dismantle itself, through piece-by-piece sharing of its assets, if a jury finds that such creeping divestiture, at prices and on terms the jury finds "reasonable," would improve the market overall. Such a duty, however, has never been recognized by Section 2, would require antitrust judges and juries to do what they have never done and are not suited to do, and would conflict with antitrust doctrine and policy. Indeed, Trinko effectively concedes as much: at crucial turns, it relies on the Telecommunications Act of 1996 to support what it cannot justify on antitrust grounds alone. But relying on the 1996 Act to expand Section 2 gets things backwards. Congress imposed an "extraordinary" dismantling duty in the 1996 Act (FCC, *August 2003 Local Competition Order* ¶ 2), choosing expert agencies (not juries) and traditional regulatory mechanisms (not class actions and treble-damage awards) to carry out the experimental task of quickly inducing new entry while not unduly deterring new investment. That regime makes Trinko's proposed new Section 2 duty both inappropriate and unnecessary.

The positions of Trinko and its supporting *amici* are unavoidably sweeping. Roughly 25 million local lines are being served by competitors, more than 18 million of them obtained from incumbents under the supervision of federal and state regulators. FCC, *Local Telephone Competition* (June 2003) (December 2002 figures, showing drop in incumbent lines as competitor lines increase). Unable to allege an actual refusal to deal, Trinko must invoke Section 2 to address the price, pace, types, and other terms of "reasonable" sharing. This claim would transform antitrust juries and judges into shadow utility regulators empowered to supplant agency resolutions of intricate disputes involving hundreds of competitor-incumbent agreements. The Court should reject this duty and, in any event, should apply traditional statutory-standing rules to bar Trinko from suing for injury derivative of the alleged direct injury to AT&T.

A. Section 2 Precedents Do Not Support Trinko's Claim

Trinko has not cited a single decision that imposed Section 2 liability on a firm that *did* share its assets, but on insufficiently generous terms. Some decisions impose Section 2 liability where the defendant outright refused to deal, but only where the defendant was voluntarily selling to other customers what it denied to competitors. Trinko Br. 21-22, 43-45. The "essential" feature of every pertinent duty-to-deal precedent, as Judge Posner noted, was a flat denial to competitors (or their customers) of terms offered to other outside customers. VZ Br. 17-19; *see also Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 368-69, 375 (1927) (manufacturer suddenly "refused" to sell to the plaintiff dealer "on the same terms as other dealers"). This case undisputedly involves no such selective refusal to deal.

The selective character of a refusal to deal is centrally relevant to the antitrust analysis, and the uniform presence of a selective refusal in the facts of this Court's cases is critical to their scope. *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944) (Court's precedents "are to be read in the light of the facts of the case under discussion"); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 529-30 & n.19 (1983) (*AGC*). Sharing duties present two core problems. They dampen incentives for investment, thus risking harm to competition, and they require detailed and uncertain prescriptions of price and other terms of sharing. Antitrust litigation cannot sensibly manage those problems. *Cf.* R. Posner, *Antitrust Law* 242 (2d ed. 2001) (to adopt unilateral duty to deal, court would "become[] charged with the supervision of an ongoing commercial relationship, a function that courts are not equipped to perform effectively"). If, however, a defendant is voluntarily offering non-competitor outsiders the terms the competitor wants, those terms are presumptively adequate to repay the owner's investments, and they also supply a simple judicial remedy if the selective refusal is not otherwise justified: order equal

treatment. *See* VZ Br. 18-19; SG Br. 23 n.8. In all the pertinent cases, the discriminatory refusals eliminated insuperable problems that the Court otherwise would have had to confront. *See* SG Br. 10, 19, 22 n.7, 23 & n.8, 24 n.9.

This essential feature is present in both *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), which also differ from Trinko's case on additional grounds. Otter Tail was held liable for entering into restrictive agreements as well as for its naked refusal to supply power to downstream competitors that it willingly supplied to non-competitor customers. *See* 410 U.S. at 378-39; R. Bork, *The Antitrust Paradox* 354-55 (1978) (also highlighting sham litigation). And unlike here, Section 2 was not being invoked to supplement a requirement already imposed by a regulatory scheme: the regulatory scheme in *Otter Tail* did not require dealing. 410 U.S. at 375. Even at the remedy stage, no judicial determination of proper terms of dealing was required. No damages were sought, so there was no issue of what terms would have been reasonable. The prospective relief simply barred the outright refusal to deal, with terms of dealing left to a federal agency. *Id.*

The *MCI* decision, which is not a precedent of this Court, undermines rather than supports Section 2 recognition of Trinko's claim. Br. 16-17, 24-25 (describing allegations here, not including actual denials).[1] As Trinko accepts (Br. 45),

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[1] Trinko (Br. 22 & n.9) accepts that the essential facilities doctrine is not this Court's doctrine and cites no decision except *MCI* finding liability for unilateral conduct under it. (The article Trinko cites is criticized in Marquardt & Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson, and Hooks*, 70 Antitrust L.J. 847 (2003).) Moreover, Trinko oversells *MCI*'s role in creating long-distance competition: as shown by MCI's seeking of only *retrospective* relief, by the time *MCI* was decided, the FCC plainly required the access MCI sought; and it was the Seventh Circuit's *rejection* of MCI's

MCI involved AT&T's flat refusal to connect MCI's independent long-distance facilities to AT&T's local network, even though AT&T was selling such connections for the very same services to other "'independent telephone companies.'" VZ Br. 42 (quoting 708 F.2d at 1144 and FCC decision).[2] In fact, Trinko's demand is that Verizon "'fill in the gaps in its competitor's network,'" a duty the Seventh Circuit specifically rejected, and that Verizon do this gap-filling by giving up the opportunity to use the facilities surrendered, which *MCI* specifically did not require. *See* VZ Br. 42-43. Moreover, as Trinko notes (Br. 3), *MCI* addressed claims arising at a time when the applicable regulatory regimes positively endorsed local monopolies, protected their investments through rate-of-return regulation, and barred rival investments. As to the long-distance access MCI sought, the *MCI*–era regulatory regime lacked the key features of the 1996 Act: substantive *statutory* rights to access, and a guarantee of fast, reviewable agency action on all access demands. VZ Br. 43. Trinko's

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demand to share AT&T's long-distance network that forced MCI to *build* competing long-distance facilities.

Litton Sys., Inc. v. AT&T, 700 F.2d 785 (2d Cir. 1983), was not an essential facilities case. "The gist of Litton's case and the jury's findings" was that AT&T made "bad faith" regulatory filings to stop competitors' activities (*id.* at 790); the decision recognized no duty of AT&T to share its facilities with rivals on reasonable terms so the rivals could displace its use of them. The district court in *United States v. AT&T*, 524 F. Supp. 1336, 1354-57 (D.D.C. 1981), merely denied dismissal after the Government's evidence but did not adjudicate its claims (including some accepted and some rejected in *MCI*). The *AT&T* court's later decade-long control of telephone matters by consent decree was specifically repudiated in the 1996 Act, which returned authority to regulators.

[2] AT&T tries to fudge this fact but does not deny it. AT&T Br. 6 n.6. It says of the above-cited page—*MCI*'s discussion of MCI's tying claim—that the court "did not accept" the claim. What the court said was that it "need not reach" the claim because it was substantively identical to the Section 2 claim it *did* accept. The existence of the voluntary AT&T sales to non-competitors, recited in the FCC orders elsewhere discussed in *MCI*, was undisputed.

claim is far more like the claim *MCI* rejected than the claim it approved.

B. Section 2 Doctrine Does Not Support Trinko's Claim

The Court's articulations of how to distinguish permissible from impermissible unilateral conduct under Section 2 lend no independent support to Trinko's claim. Much of Trinko's brief sidesteps that critical question, *e.g.*, when it says that some refusals to share "can" be unlawful, or when it invokes words ("exclusionary," "predatory," "anticompetitive") that convey no more than a bottom-line conclusion of wrongfulness, or when it urges a "case-by-case" "contextual approach." Br. 20-25, 44. Elsewhere Trinko invokes two of this Court's formulations for making the critical distinctions—"efficiency" and "legitimate business justification"—but those formulations undermine rather than support Trinko's unreasonable-sharing claim. This Court's doctrines do not require a dominant firm to displace its own retail sales to customers in favor of discounted wholesale sales to rivals.[3]

1. Trinko's principal position is that Section 2 condemns "acts not premised on the monopolist's superior efficiency." Br. 1; *id.* at 17, 20, 25, 27 (drawing from *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985)). But that standard does not condemn the simple refusal to furnish one's assets to rivals, at discounted prices, for them to use instead. Section 2 *protects* the ability of firms, even monopolists, to engage in competition by using inputs that rivals lack because they came too late. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (monopo-

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[3] Trinko's footnote on "monopoly leveraging" (Br. 24 n.10) defends neither the Second Circuit's statement that "use of a monopoly" is actionable conduct (*see* SG Br. 26 ("use of monopoly power is not unlawful")) nor its statement that merely gaining a competitive advantage in a market, rather than actual or attempted monopolization, suffices under Section 2. The Second Circuit's statements amount to a frontal assault on vertical integration of a wholesale monopolist into retail sales, based simply on its refusal, or insufficient efforts, to support resellers.

list *may* keep the fruits of "growth or development as a consequence of a superior product, business acumen, or historic accident") (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)). Contrary to Trinko (Br. 40-41 & n.18), Section 2 has never required a firm to facilitate *overall* market expansion by turning over its assets for resellers and other rivals to use in its place. *See* 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 658f, at 131-32 (2d ed. 2002) ("not even a monopolist operates as a trustee for the public. A successful business justification need not improve market efficiency overall. *** As a general matter, a firm is under no obligation to sacrifice its own profits in order to make the overall market larger."); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 773e at 146 (2003 Supp.); SG Br. 14.

Trinko's argument rests on a misunderstanding of the use of "efficiency" in *Aspen*. The Court used the phrase "'on some basis other than efficiency'" (472 U.S. at 605) to refer to the *defendant*'s efficiency, not overall market improvement. *Aspen* drew the phrase from the Bork book, which uses "efficiency" to mean "the effective use of resources *by particular firms*" (Bork, at 91, 105-06 (emphasis added)), and which makes clear, at the very page quoted by the Court, that a firm's "market behavior with *** the expectation *** [or] result of making money" *is* acting on the basis of efficiency. *Id.* at 138. Indeed, the book defines acting on a basis other than efficiency ("predation") to mean conduct that makes no business sense *for the defendant* except for its buttressing monopoly.[4] That is why this Court in *Aspen* stressed the defendant's self-sacrifice in turning away sales at prices it had readily accepted from mere customers, thereby making less productive use of the assets it owned. This lowering of profits made no business sense, except for recoupment through enhancing the monopoly.

[4] Bork, at 144 (predation is "aggression against" rivals by conduct "that would not be considered profit maximizing except for the expectation either that (1) rivals will be driven from the market, leaving the predator with a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior").

Trinko's public-trustee view—that monopolists must share on terms a jury finds would improve the market overall—is unworkable in practice and doctrinally unsound. Direct judicial assessment of overall market efficiency and net social welfare effects is exceptionally difficult if not impossible. Bork, at 124-127; Posner, at 29. And individual firms, while they can assess their own interests, can hardly assess overall market efficiency, or predict individual juries' or judges' assessments, to decide day by day whether and on what terms they must share. More fundamentally, Section 2 doctrine has long recognized that *long-run* market efficiency requires protecting the *ex ante* incentives of all firms, including dominant ones, to invest and to compete hard. *See* VZ Br. 14-15, 23. Even for allegedly nonduplicable assets, it is critical to preserve the incentives to invest—in maintenance, upgrade, and replacement. *AT&T Corp. v. Iowa Utils. Bd.*, 535 U.S. 366, 428-29 (1999) (Breyer, J., concurring in relevant part). A Section 2 duty to share assets, whenever a jury finds short-run market benefits, would seriously undermine investment incentives and thus diminish the long-run efficiency of the market as a whole. *See* VZ Br. 29 (exclusivity of property rights—letting firms use what they build for their own services—encourages continued investment); Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. (forthcoming Nov. 2003), www.law.harvard.edu/faculty/elhauge.

Accordingly, Section 2 does not condemn merely *acquiring or continuing* a lawful monopoly, or exploiting one by charging high prices. *See Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998) (exploiting lawful monopoly is not harming competition); SG Br. 13, 18-19; Posner, at 250. Likewise, Section 2 "does not prohibit failure to share monopoly power" and "does not require firms–whether or not

monopolists–to sacrifice profits to sell to competitors at a discount." SG Br. 7, 10. "As Judge Hand wrote, '[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.'" SG Br. 15 (quoting *United States v. ALCOA*, 148 F.2d 416, 430 (2d Cir. 1945)).

2. Trinko gets no further when it frames the antitrust standard as condemning conduct unsupported by a "legitimate business justification" or "'legitimate competitive reason.'" Br. 17, 21, 23, 25, 26, 31-32. There *is* a "legitimate justification" for using an asset to sell service at retail rates rather than selling it at wholesale rates to a rival. "[T]he Sherman Act has never required a firm to make an unprofitable sale or forego profitable sales in order to make less profitable sales to a competitor." *Antitrust Law* (2003 Supp.) at 148 n.6 (citing *Aspen*, *Kodak*, *Otter Tail*, and other cases). *Id.* at 149 ("'Unjustified' refusals make economic sense only because of their adverse impact on rivals."); SG Br. 20 ("refusal to sell an input to a rival when it requires the incumbent to forfeit profits would make obvious business sense").

3. Trinko makes no serious attempt to show that it has alleged enough to sustain a claim under the principle that, to be condemned, a refusal to deal must make business sense *only* insofar as it tends to buttress monopoly power. SG Br. 15-20; VZ Br. 20-27. Trinko makes one passing reference to regulatory fines under the 1996 Act (Br. 32 n.14), but does not even allege that it is irrational to risk such fines except in anticipation of reinforcing a monopoly. Everywhere else, Trinko accepts, as it must, that a simple refusal to surrender a monopoly sale, in favor of a discounted sale to a rival retailer, cannot be treated as reinforcing monopoly power without transforming Section 2 into a bar on monopoly itself—which, as explained, it is not. And Trinko's complaints do not allege, and its brief does not seriously assert, that it makes ordinary sense for Verizon to give up retail sales and customer contacts in favor of wholesale sales at regulated discounts, least of all when doing so requires developing new and expensive electronic interfaces for dealing with rivals and assuming the high transactions costs of negotiating, arbitrating, and resolving disputes under agreements with these same rivals. *See* SG Br. 8, 28-29; *id.* at 3 n.1 (*amicus* Z-Tel: wholesale discounts reduce incumbents' margins).

Unable to dispute that its complaint flunks the no-business-sense requirement, Trinko attacks the requirement. Br. 39-43. But the attack fails. As noted, this Court's efficiency and business-justification formulations are properly understood to condemn refusals to deal only if the refusal makes no business sense except to reinforce monopoly. *Aspen* decisively relied on this inquiry when it stressed—in *addition* to harm to rivals and harm to consumers—that the defendant was making a self-sacrifice that made no sense but for enhancing monopoly power. This Court's predatory-pricing decisions likewise condemn price cuts only if the defendant is acting against its interests by incurring losses through below-cost prices, regardless of whether rivals can survive the price cuts or whether the defendant later charges higher prices. *See* SG Br. 16, 20. Even the *amici* economists promote this requirement as important to protecting aggressive competition; they support Trinko *only* for a distinctly non-economic reason, that the 1996 Act requires sharing. Economists Br. 4-9, 27.

Mischaracterizing or misapplying the requirement cannot undermine it. The requirement does not protect "'promotion of self-interest alone'" (*Otter Tail*, 410 U.S. at 380, quoted at Trinko Br. 44); it protects conduct that advances self-interest *independent of enhancing monopoly power*—a distinction that is essential if antitrust law is to make any economic sense at all. It does not license sham litigation or burning down a rival's factory (Trinko Br. 40), which presumably serve *only* to delay or prevent competition. Like any other legal standard, it does not hand victory to any defendant that makes a "claim" of benefits, let alone an "insubstantial" one. *Id.* at 40. Conduct does not make business sense just because it

confers some benefit; what matters are *net* benefits. Allegiance Br. 12. At least for sharing claims, there has been no sound criticism of the "no business sense apart from buttressing monopoly" requirement for condemnation.[5]

4. Trinko invokes two other formulations from outside this Court. It refers in passing to "raising rivals' costs," citing certain articles. *See* Br. 40. But that phrase is not a standard of conduct at all. It merely identifies a form of harm to rivals, *i.e.*, raising their costs rather than excluding them. Harm to rivals, which occurs equally with impermissible and permissible conduct, does not state a claim. *See* Posner, at 196-97. Trinko also quotes (Br. 39) the D.C. Circuit's statement that the last step of a potential five-step inquiry is to ask if "the anticompetitive harm of the conduct outweighs the procompetitive benefit." *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). But *Microsoft* never engaged in any such weighing, and therefore never explained how it could be carried out. For every one of the challenged actions, the court either held it lawful (there was no *prima facie* market harm or it was justified) or held it unlawful (there was market harm but no justification) at a prior stage of the analysis, without any balancing. The Government did not urge balancing in *Microsoft* and does not do so here. At least for sharing claims, a vague "balancing" test carries intolerable risks of deterring aggressive competition.

Finally, Trinko asserts that refusing to turn over one's retail customers is "facially anticompetitive," *Kodak*, 504 U.S. at 478-79, like Kodak's sudden refusal to sell to rivals what it was selling to others. Br. 42. But there is nothing "facially anticompetitive" about simply using one's own resources to

[5]This context, like price cutting, involves a high risk of high-cost error. There is no need to decide here whether the same requirement applies to cases of false representations, which may or may not raise *antitrust* issues (Economists Br. 8).

provide one's own service. It is cooperation, not competition, that is "facially anticompetitive." 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 772c at 192 (2d ed. 2002) (monopolist-rival cooperation "almost always invite[s] antitrust scrutiny"), cited at Trinko Br. 30.

C. Trinko's Claim Is Inconsistent With Substantive And Institutional Antitrust Policies

Under Trinko's theory, an antitrust treble-damages action could arise from any of the countless disputes that are inevitable in the new regime of forced incumbent-competitor relations. Any disappointed new entrant could accuse an incumbent of deliberately providing unreasonable terms of access to assets that are not "practical" or "feasible" to duplicate, with significant effects on the market. Trinko Br. 18, 29. A Section 2 rule recognizing such claims carries unavoidable risks of discouraging investment that antitrust law has long encouraged. The FCC (*August 2003 Local Competition Order* ¶ 3) and the industry's equipment suppliers have explained the reasons. Incumbents will face higher capital costs and will invest less if rewards must be shared while risks are borne alone; and if sharing is too cheap, new entrants will invest less in new facilities, including in wireless or cable or optical fiber substitutes for copper loops.[6] The risk is that the status quo gets frozen.

[6] *See id.* ¶ 3 ("excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology"); *id.* ¶¶ 6, 22, 33, 64, 113-14, 173 n.556; TIA Br. 18-19; Latour, *Local-Phone Companies Face Siege in an Industry in Turmoil*, Wall St. J., Aug. 13, 2003, at A1, A6 (because of forced rental, "[t]he four Bells have drastically reduced spending to upgrade their networks"; "Even some consumer advocates," who "had pressed regulators to foster more competition," now "worry that the resulting price wars have led SBC to invest less in its network. The long-distance companies aren't investing much either, of course, since they can tap SBC's network at low cost. 'Something is not quite right here,' says Mark Philger, chairman of a group called Americans for Competitive Telecommunications.").

Managing the risk of deterring new investment requires weighing the long-term effects of a sharing principle and evaluating the short-term benefits and risks of a particular sharing mandate in light of the exact prices and other terms the mandate prescribes. That delicate task is surely not one that juries and judges can perform reliably in after-the-fact treble-damages antitrust litigation, least of all class-action litigation. It is, at best, a highly uncertain balancing task that depends on identifying situations where forced sharing on particular terms yields greater predicted benefits than costs. Any such terms must be set tentatively, experimentally, and prospectively, and repeatedly fine-tuned, and, when unnecessary, repealed altogether. *See August 2003 Local Competition Order* ¶ 200 (FCC "balances *** promoting facilities-based investment and innovation against *** stimulating competition"; divided Commission repealing earlier sharing duties and retaining others).

> [T]he identification and remediation of these situations is best dealt with through industry-specific legislation and regulation–like the 1996 Act–which can be developed by legislative branches and administrative agencies with superior factfinding ability, greater industry expertise, existing capacity for ongoing oversight and refinement, and the public accountability that is an important companion to such economic policy choices.

SG Br. 18.; *see also Antitrust Law*, at 150-51 (2003 Supp.) ("technically complex task for which antitrust courts are ill suited, particularly via jury trials"). It would be unwise to expand Section 2 to take on such traditionally regulatory tasks, even if there were no 1996 Act. *See* CWA Br. 6-12.

Trinko's main response is to treat Section 2 simply as a tool of 1996 Act enforcement–a fallacy addressed below. But it also makes two erroneous arguments for why forced sharing cannot deter investment. *First*, Trinko says that investments cannot be deterred because loops cannot be duplicated. Br. 29. But this assertion wholly ignores needed investments

by *incumbents*. Loop plant constantly is being created, maintained, upgraded, and replaced by hundreds of thousands of workers deploying tens of billions of dollars of new equipment annually. CWA Br. 1; TIA Br. 18 n.6. And much more than loop plant is at issue here. As the *amicus* briefs show, the *legal principle* that Trinko proposes–"reasonable" access to facilities deemed "infeasible" or "impractical" to duplicate—has been invoked in demands to share interoffice trunks, switches, space in central offices, bathrooms, and computerized ordering, billing, and other operations-support systems, either because those facilities are themselves not feasibly or practically duplicated or because they are needed adjuncts to loop access.

Trinko's point ignores new investment by rivals as well. With over 6 million independent loops (*Local Telephone Competition*, Tables 3, 10; *see also* Table 13 (136 million wireless lines)), and substantial independent investment in other facilities (*e.g.*, *August 2003 Local Competition Order* ¶ 436 ("significantly increased" switch deployment)), it is plain that some rivals do not share Trinko's and its supporting *amici*'s views that such investments are infeasible. Trinko's proposed "successful sharing or triple your money back" guarantee for rivals skews the choice toward sharing and away from independent investment.

Second, Trinko says that the investment-deterring effects of forced sharing are eliminated because the 1996 Act already forces it. Br. 30. That contention is wrong. Agencies exercise their judgment not just in formulating but in interpreting and applying access requirements, and they use traditional regulatory mechanisms to enforce them. At all the places in that process where there is room for judgment, changing the adjudicator and dramatically amplifying the threatened consequences of supposed misconduct would sharply influence conduct across the board, as two *amici* economists have written. *See* VZ Br. 24 n.20, 31 n.29. The prospect of costly class-action antitrust litigation, retroactive treble-damages

liability determined by lay juries, and judgments that have preclusive and precedential effects (and are difficult to prove outmoded) would push sharing decisions in one direction only, upsetting the balance struck by regulators. The alteration of liability risks is surely just what those bringing antitrust claims like Trinko's are seeking to achieve.

D. The 1996 Act Makes Recognizing Trinko's Novel Claim Especially Inappropriate

Trinko, like its supporting *amici*, recognizes that the 1996 Act is relevant to whether it has stated a Section 2 claim, wholly apart from any argument that the Act confers "immunity" by overriding a pre-existing antitrust proscription. Br. 18, 30, 35-38. But Trinko gets matters precisely backwards in urging that the 1996 Act *supports* recognition of a new Section 2 duty that it cannot otherwise justify. The 1996 Act supplies conclusive reason *not* to expand Section 2 duties to address the fine-tuning of sharing that is already subject to comprehensive control under the 1996 Act.

1. Evidently recognizing the problems with a Section 2 unilateral duty to share on terms never before offered, Trinko seeks to avoid the problems by relying on determinations under the 1996 Act to define the antitrust violations. Br. 31. There can be no "legitimate" business justification, Trinko reasons, for conduct that violates the 1996 Act. *Id.* at 32, 35-38. Its supporting *amici* economists would turn deficiencies in the terms of sharing into antitrust violations *solely* because they fall short of 1996 Act requirements.

These arguments fly in the face of the savings clause. They invoke 1996 Act duties to "modify" the duties Section 2 otherwise recognized. *See* SG Br. 6 (savings clause bars use of 1996 Act to "expand[] antitrust liability by creating new antitrust duties that did not exist before"). The savings clause declares that Congress was *not* treating the new 1996 Act sharing duties as if they defined a new standard for "restraint of trade" or "monopolizing" conduct under the Sherman Act. *Compare Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429,

439-40 (1992) (law deeming certain conduct to come within prior statute "modified" prior statute).[7] To say that 1996 Act violations are not "legitimate," moreover, is a mere linguistic ploy, as irrelevant to the Section 2 question as saying "that the public interest is not well-served" by 1996 Act violations. Economists Br. 26. The question is whether the conduct is contrary to *Section 2* policy, not whether it is contrary to another statutory policy or legal norm. The Court has specifically cautioned against confusing antitrust wrongs with other wrongs, including even the evasion of regulatory controls on exploitation of a monopoly. *NYNEX*, 525 U.S. at 136, 137.[8]

It makes no difference that both Section 2 and the 1996 Act reflect a desire for competition: the statutes differ sharply in the duties they create and the enforcement mechanisms they adopt. As the Government confirms, the 1996 Act's substantive standards are *not* antitrust standards. Notably, the 1996 Act regime prescribes low prices to attract entry, stopping just short of confiscation (VZ Br. 4), whereas "the antitrust laws *** permit firms to charge whatever prices they can obtain in the marketplace." SG Br. 18 (citing authorities); *id.* at 9, 10, 23; *see also August 2003 Local Competition Order* ¶ 107 ("Congress chose to use a different standard" from "essential facilities doctrine"). In addition, the two statutes embody radically different implementation and remedial choices. This Court has long insisted on respecting those

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[7] After *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), a House committee considered an amendment to the Clayton Act that would have expressly "deemed" a 1996 Act violation to be an antitrust violation. H.R. 1698, § 2, 107th Cong., 1st Sess. (May 3, 2001). The present savings clause does not do that.

[8] That violations of other standards overlap *as a matter of fact* with violations of Section 2 standards (*see* ABA, *Antitrust Law Developments* 249 (5th ed. 2002), cited at Trinko Br. 32; SG Br. 12 n.3), does not mean that wrongfulness under the former is the reason, or even a reason, for finding the conduct wrongful under Section 2. An examination of the ABA statement and its footnote support confirms that it is, at best, a description of overlap.

choices as well. *See* R. Fallon, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 841-42 (4th ed. 1996).[9] Such respect is most important when one statute "comes as close to the line of over-regulation as possible–that is, to achieve the benefits of regulation right up to the point where the costs of further benefits exceed the value of those benefits." Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 541 (1983).

2. That the Sherman Act and the 1996 Act embody such different enforcement regimes is an affirmative reason *not* to expand the former to cover the sharing duties addressed in the latter. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 180-82 (1989) (refusing "'to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute'"). The "specific governs the general" principle applies here, because congressional policies are at stake. *Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996).[10] Whether juries and judges would re-

[9] In many contexts since the 1970s, the Court has rejected the notion that it is better, or even permissible, to add remedies to those Congress chose for particular statutory violations, recognizing the importance of congressional *remedial* choices, such as whether agencies (or numerous individual judges or juries) resolve disputes under potentially open-ended standards, and what remedies attach to violations. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 290 (2001); *Karahalios v. Nat'l Fed. of Federal Employees*, 489 U.S. 527, 533 (1989); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 146-147 (1985); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assn.*, 453 U.S. 1, 19-20 (1981); *Northwest Airlines, Inc. v. Transport Wkrs.*, 451 U.S. 77, 93-94 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979).

[10] This is particularly appropriate for shaping the "common law" of antitrust. *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 732-33 (1988). In another context the Court explained: "Not only are the technical problems difficult–doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise–but the general area is particularly unsuited to the approach in-

decide questions of reasonableness by balancing costs and benefits of sharing, or whether they would subject matters already decided by agencies to treble damages, class actions, and judicial injunctions, the result would be displacement of the congressional choice of agencies to handle these matters through regulatory processes. And Section 2 litigation would inevitably operate as an "extraneous pull" on agency processes themselves (*Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 353 (2001)), distorting the choices of participants and decision-makers alike.

The 1996 Act makes it not just inappropriate but unnecessary to create new Section 2 duties. As the Government emphasizes, a regulatory regime properly limits the expansion of antitrust duties where it "'dramatically alters the calculus of antitrust harms and benefits' by 'significantly diminish[ing] the likelihood of major economic harm.'" SG Br. 12, quoting *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990); *see Kansas v. UtiliCorp. United, Inc.*, 497 U.S. 199, 211-12 (1990) (regulatory remedies are reason to reject new exception to indirect purchaser bar). The 1996 Act, unlike the very different regulatory regimes in *Otter Tail* and *MCI*, does just that.[11]

Trinko's main response is a blanket reference to *pre-1996* regimes. Br. 37; *id.* at 2-7. But that response wholly ignores the specifics of the 1996 Act. By Trinko's own account, the

evitable under a regime of federal common law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981).

[11] The Government is careful not to assert the contrary, saying only that the 1996 Act "does not de facto create antitrust immunity *for otherwise anticompetitive* conduct." SG Br. 13 (emphasis added); *id.* at 10-13. That is also what is said in the statements Trinko quotes (Br. 37-38 & n.17) from the FCC and from Verizon and other incumbents, which acknowledge the continued availability of antitrust claims for price fixing, exclusive dealing, tying, boycotts, and other conduct not based on inadequate sharing. None of these statements says that sharing deficiencies are actionable under Section 2.

earlier regimes lacked the critical features of the 1996 Act—not only preemption of bars on independent competition, but substantive statutory access guarantees that are enforceable through fast reviewable agency action. With these features, the 1996 Act cannot systematically fail unless reviewing courts systematically fail, in which case the antitrust system that depends on the same courts would fail too.

Trinko's selective account of problems under the 1996 Act (Br. 11-13) not only ignores the primary role of *state* regulators,[12] but misses the key point. The dual system of state and federal regulation has resolved the problems Trinko cites (which often reflect legitimate disputes over the scope of regulatory requirements), including the one that triggered this lawsuit. *See* VZ Br. 6-7. A huge amount of access has already been given—incumbents have surrendered over 18 million lines—and more is being given daily. The FCC has found that Verizon's dealings with competitors meet such high levels of compliance with extraordinarily demanding standards that the FCC has approved Verizon's long-distance entry in every single one of its service areas. *See* VZ Br. 5 n.5. The public-record facts confirm that the indisputable statutory rights of redress are effective, undermining any argument for a novel Section 2 duty to address the same matters.

E. Trinko Lacks Statutory Standing

Even if Section 2 recognized the duty Trinko asserts, Trinko should not be able to assert it. Trinko's injury–deficient or curtailed service from its service provider AT&T

[12] State regulators have prescribed exacting "performance assurance plans" and set automatic penalties up to hundreds of millions of dollars annually for shortfalls. *See, e.g.*, *Application of Verizon New England*, 16 FCCR 8988 (2001), ¶ 241 (Massachusetts plan: penalties of $155 million); *Application of Verizon New York*, 15 FCCR 3953 (2000), ¶ 435 (New York: $269 million); USTA Br. 22 n.40; VZ Br. 5 n.5 (FCC orders describing other States' plans).

(Trinko Br. 16)–is derivative of alleged injury to AT&T. Because this Court has described directness of injury as a "requirement" (*Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992)), Trinko asserts that it was "injured directly." Br. 46-47. Assertion cannot make it so. Trinko's own direct service provider, AT&T, confirms that Trinko's alleged poor telephone service *from AT&T* was "derivative of harms suffered by AT&T." AT&T Br. 3.

Making an obscure distinction between "directness of transaction" and "directness of injury," Trinko invokes *AGC* to support its standing. Br. 47. But Trinko misunderstands *AGC*. The Court there denied standing, and, as in *Holmes*, did so for an injury (lost union dues) that was plainly "distinct" (Br. 49) from the injury suffered by direct victims (impaired choice of workers). *See* Pet. 25 n.18. *AGC*'s *dictum* that some hypothetical nonplaintiff subcontractors would have been able to sue apparently refers to *directly* injured unionized subcontractors—who "refused to yield to the defendants' coercive practices and therefore suffered" loss of contracts, presumably from contractors among the defendant conspirators. *See* 459 U.S. at 540 n.44. Likewise, *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), cannot help Trinko, because, as *AGC* repeatedly recognizes (459 U.S. at 529 n.19, 538 n.39, 540 n.44), the *McCready* plaintiff suffered "direct" injury: the defendant refused to pay her. *See also Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2d Cir. 1983) (defendants, as potential purchasers, directly boycotted plaintiff and also arranged for others to do so), cited at Trinko Br. 47 n.21.

The other considerations (besides directness) flagged in *Holmes* and *AGC* (503 U.S. at 269; 459 U.S. at 540-45) further undermine Trinko's standing: the directly injured party can be counted on to challenge and recover for any service disruptions or deficiencies, as AT&T did here; there is real potential for duplicative damage awards to both AT&T and its customers; and there are serious complications in tracing

to their true source any deficiencies in AT&T's service. For a claim of deficiencies in needed access, the direct purchaser is plainly a *better* plaintiff (*see Antitrust Law* ¶774d at 151-52 (2003 Supp.)) than a downstream customer who, in AT&T's words, "has no knowledge of any of the details of the relationships between incumbent local exchange carriers and competitive carriers." AT&T Br. 3.

Allowing indirect purchaser suits often will actually impair the interests of direct purchasers and of regulators implementing the 1996 Act. Direct purchasers and regulators typically will want to ensure *prompt* resolution, without spending heavily on litigation or arbitration; indirect purchasers (particularly in a treble-damages consumer class action) will typically be seeking a one-time award of damages, and will have to conscript the direct purchaser, and thus its time and resources, to explain its role in the provision of the allegedly deficient service. The shared interest of direct purchasers and regulators in prompt, inexpensive resolution of problems prompts them to include arbitration and no-third-party-enforcement provisions in competitor-incumbent agreements like the one here. *Order Approving Interconnection Agreement*, §§ 16, 22.3, 1997 WL 410707 (NY PSC). Recognition of tag-along consumer claims can only impair such resolutions. *See* Posner, at 279-80 (multiple antitrust litigation has costs: "The effect is to lengthen out the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation, and increase litigation costs."). Statutory standing should thus be denied to Trinko if any Section 2 claim is recognized.

For the foregoing reasons, and for the reasons previously stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
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VERIZON COMMUNICATIONS, INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF UNITED PARCEL SERVICE, INC., HONEYWELL INTERNATIONAL INC., VISA U.S.A. INC., AND EASTMAN KODAK COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

This case involves important issues in antitrust law – the validity of two theories known as "monopoly leveraging" and the "essential facilities doctrine." The court of appeals erroneously held that respondent's allegations state a claim for relief under Section 2 of the Sherman Act, 15 U.S.C. § 2, based on both theories.

United Parcel Service, Inc. (UPS) provides parcel transportation services throughout the United States and worldwide. UPS competes with a wide array of other carriers, including nationwide carriers, a host of trucking companies, logistics providers, numerous regional and local companies across the country, the United States Postal Service and other postal services around the world.

Honeywell International Inc. (Honeywell) is a diversified technology and manufacturing company that provides customers throughout the United States and worldwide with aerospace products and services, control technologies for buildings, homes and industry, specialty chemicals, fibers, plastics and electronic and advanced materials. Honeywell competes with local, regional, national, and global companies in the many industries that it serves.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk as required under Rule 37.3(a). Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, and no one other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

aspects of its members' individual programs through rules and by-laws adopted by its board of directors. Under this umbrella structure, Visa's members issue payment cards to consumers and sign up merchants to accept Visa payment products.

Eastman Kodak Company (Kodak) is a global developer, manufacturer and supplier of imaging products and technologies used by consumers, medical professionals, professional photographers, movie and television producers, government customers and commercial businesses. Kodak operates manufacturing plants, research facilities, distribution centers and business offices throughout the United States.

Amici have a strong interest in ensuring that the antitrust laws are applied by the lower courts to promote aggressive competition, not to shield inefficient competitors from the forces of such competition. Because of their nationwide operations, *amici* also have a strong interest in ensuring the uniform application of the antitrust laws throughout the country, so that their operations and business decisions are not subject to different standards in different jurisdictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

A claim for violation of Section 2 of the Sherman Act cannot be stated under the court of appeals' theories of "monopoly leveraging" or denial of access to an "essential facility." Neither of those labels provides an independent basis for a Section 2 claim because neither requires courts to determine whether monopolization through predatory conduct, which is at the heart of Section 2, is alleged in a particular case. The Court should reject the use of those labels and provide clear guidance to the lower courts by reaffirming that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so" through anticompetitive means.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

I. Under the court of appeals' "monopoly leveraging" theory, a firm violates Section 2 if it uses monopoly power in one market to "gain a competitive advantage" in a second market, even if there has been no attempt to monopolize the second market. This holding is inconsistent with the text and purpose of Section 2, as well as this Court's teachings. Section 2 prohibits monopolization and attempted monopolization. Recognizing that the statute "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself," the Court has long held that that statutory prohibition reaches only "predatory or anticompetitive" conduct that creates or enhances monopoly power. *Spectrum Sports*, 506 U.S. at 456-458. Section 2 "leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization)." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 774 (1984).

Consistent with these teachings, the court of appeals' monopoly leveraging theory has been rejected by most other circuits, and criticized by antitrust scholars, as an improper and dangerous extension of Section 2. These courts and commentators correctly recognize that any use of monopoly power to engage in predatory conduct that monopolizes or attempts to monopolize a second market can be reached under traditional Section 2 standards. By creating potential antitrust liability and treble damage exposure for conduct that, far from lessening competition, often benefits consumers by enabling large firms to lower costs and offer new products through vertical integration, the court of appeals' monopoly leveraging theory undermines the purposes of the antitrust laws.

II. The court of appeals' reliance on the "essential facilities doctrine" as an independent basis for Section 2 liability is equally erroneous. Under the lower court's ruling, a firm that controls any business asset that competitors deem "essential" to their success may find itself

subject to a Section 2 action demanding that the firm surrender exclusive control over that asset and permit a rival to use it regardless of whether the firm's refusal to assist its rival is predatory and gives rise to a dangerous threat of monopoly power. This holding, too, is inconsistent with the text and purpose of Section 2 and this Court's teachings: absent predatory conduct that monopolizes or genuinely threatens to monopolize, the Sherman Act "does not restrict the right of a trader or manufacturer * * * freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Although some lower courts have used the essential facilities doctrine to analyze allegations that a monopolist in one market denied competitors access to an "essential facility" in order to obtain a monopoly in a second market, the court below went far beyond such cases. It held that Section 2 imposes on a lawful monopolist a duty to create a wholesale market in the monopoly product so that other firms may buy that product at a reduced price, and then resell it in competition with the monopolist. That extraordinary rule is flatly inconsistent with long-settled Section 2 jurisprudence, which has never required a lawful monopolist to alter its business in order to create competition in its own market, and would threaten to defeat the Sherman Act's objectives of promoting aggressive competition on the merits. "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

Even in its narrower form, the essential facilities doctrine has been widely criticized by other courts and commentators as being antithetical to the purposes of the antitrust laws. The central message of the Sherman Act is that competition, not cooperation, is the antidote for monopoly. The essential facilities doctrine, however, mandates cooperation among rivals, and thereby diminishes incentives for firms to compete on the merits. The doctrine also requires courts to become regulators –

designing, implementing, and monitoring the terms upon which forced access to a competitor's assets is granted. For these reasons, the competitive problems presented by natural monopolies – the only kinds of assets that might be deemed "essential facilities" – have generally been addressed through statute and administrative action.

This Court has never adopted the essential facilities doctrine. In those few cases in which the Court has found that a monopolist's unilateral refusal to deal with its rivals constitutes predatory conduct that monopolizes or dangerously threatens to monopolize a relevant market, it has employed the traditional Section 2 standards and found them to be adequate to the task. The essential facilities doctrine, like the monopoly leveraging theory, serves only to undermine the purposes of Section 2 and should not be adopted by this Court.

The Court should be particularly skeptical of judicially crafted antitrust rules, like monopoly leveraging or the essential facilities doctrine, that ban a particular type of conduct without determining whether conduct in a particular case is anticompetitive. That is because, as this Court has recognized, "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects," *Spectrum Sports*, 506 U.S. at 458-459, and "mistaken inferences" about competitive conduct "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). Moreover, "single firm activity," which is addressed by Section 2, "is unlike concerted activity covered by § 1 [of the Sherman Act], which 'inherently is fraught with anticompetitive risk.'" *Spectrum Sports*, 506 U.S. at 458 (quoting *Copperweld*, 467 U.S. at 767-769). It is "for these reasons," that Section 2 "makes conduct of a single firm unlawful only

when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports*, 506 U.S. at 458.[2]

I. THE COURT OF APPEALS' MONOPOLY LEVERAGING THEORY EXCEEDS THE SCOPE OF SECTION 2 OF THE SHERMAN ACT

A. Section 2 Is Not Violated When A Firm Uses Its Lawfully Acquired Monopoly Power In One Market To "Gain A Competitive Advantage" In Another Market

1. Section 2 of the Sherman Act makes it unlawful for a person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. In *Spectrum Sports v. McQuillan*, 506 U.S. 447 (1993), the Court confirmed that monopolization is at the core of a Section 2 violation. Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Id.* at 459.[3]

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[2] *Amici* address only the merits of the monopoly leveraging and essential facilities rulings in this brief and do not discuss the statutory standing ruling challenged by petitioner, although we agree that that ruling also is erroneous. *See* Pet. 23-26. The questions on the merits can be addressed by the Court without reaching the statutory standing issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998). We urge the Court to address these merits questions as a threshold matter, in light of the serious adverse consequences for the nation's economy that flow from the court of appeals' erroneous rulings on monopoly leveraging and essential facilities and the fact that lower courts are in need of guidance on these issues.

[3] The Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Although the issue of whether a firm possesses such power must be evaluated in the context of a specific market, the Court has found that market shares of 75 percent or more generally give rise to a presumption of monopoly power. *See, e.g.*,

(Continued on following page)

This Court also has held that Section 2 prohibits monopolization only through conduct that is "predatory or anti-competitive" – *i.e.*, conduct that makes economic sense only insofar as it would eliminate competition. *Id.* at 456. And it is clear that "a practice is not 'anticompetitive' simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is 'anticompetitive' only if it harms the competitive process. * * * It harms that process when it obstructs the achievement of competition's basic goals – lower prices, better products, and more efficient production methods." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21-22 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) (citing, *inter alia*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

This Court has explained, for example, that monopoly power that is acquired through "growth or development as a consequence of a superior product, business acumen, or historic accident," is not proscribed by the antitrust laws and is lawful. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Such a lawful monopoly, "absent 'predatory' practices to maintain it, will continue only so long as the monopolist sustains a level of efficiency or innovation such that its rivals cannot effectively compete. Because this type of monopolist behaves in an economically efficient manner, the antitrust laws do not stand as an obstacle to its existence." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992). That is because the purpose of Section 2 "is not to protect businesses from the working of

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Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) (80 percent share); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (87 percent share); *E.I. du Pont*, 351 U.S. at 391 (75 percent share).

the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports*, 506 U.S. at 458.

2. The Court's precedents make clear that gaining a competitive advantage in a second market is not sufficient to subject a monopolist to liability under Section 2. In particular, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court emphasized that Section 2 applies only to unilateral conduct and "leaves untouched a single firm's *anti-competitive conduct* (*short of threatened monopolization*) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability." *Id.* at 774 (emphasis added). The Court explained that "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Id.* at 768.

Indeed, the zealous pursuit of competitive advantage – by firms large and small – is precisely what the Sherman Act is intended to foster. As this Court has recognized, "[it] is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) (citation omitted). Put simply, "[t]he lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375-376 (7th Cir. 1986) (Posner, J.), *cert. denied*, 480 U.S. 934 (1987); *see also Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534, 543-544 (9th Cir. 1983) ("A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits."), *cert. denied*, 465 U.S. 1038 (1984).

3. The court of appeals reached its contrary ruling – that a monopolist violates Section 2 if it "gains a competitive advantage" in a second market – by extending Section 2 under the guise of the "monopoly leveraging" theory. That theory is rooted in that court's earlier opinion in *Berkey Photo, Inc. v. Eastman Kodak Company*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), where it had declared that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market." Pet. App. 30a (quoting *Virgin Atl. Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001), which relied on *Berkey Photo*). That decision, in turn, had quoted *dicta* in *United States v. Griffith*, 334 U.S. 100, 107 (1948), suggesting that a monopolist was prohibited not only from using its monopoly power to create another monopoly, but also from using it to "gain a competitive advantage." *Berkey Photo*, 603 F.2d at 275 (quoting *Griffith*, 334 U.S. at 107).

The *holding* of the Court in *Griffith* made clear, however, that liability under Section 1 and Section 2 of the Sherman Act requires a finding that a "restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangement." *Griffith*, 334 U.S. at 105; *id.* at 106 (noting that the question for the Court to resolve was whether the agreements resulted in "restraining or monopolizing of trade within the meaning of the Sherman Act"). Moreover, the Court's subsequent decision in *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 482-483 (1992), confirmed that reading when it quoted the *Griffith* language in describing the elements of a Section 2 claim, but immediately followed the quote with the explanation that, if the defendant there adopted the challenged policies "as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2." *Ibid.* The Court thereby demonstrated that *Griffith* does not eliminate the need to establish monopolization or attempted monopolization through anticompetitive

means before a firm can be subject to liability under Section 2. The Court's teachings in *Spectrum Sports* and *Copperweld* confirm that fact as well. *See also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

The *Griffith dicta* referring to "gain[ing] a competitive advantage" cannot be read to override those precedents. Indeed, that *dicta* was only one reference in a list of examples of what monopoly power could not be used to do and other examples included "foreclos[ing] competition" and "destroy[ing] a competitor," 334 U.S. at 107, which would be rendered superfluous under respondent's reading. *See also* 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772b3, at 180 (2d ed. 2002) ("Areeda & Hovenkamp") (observing that "[i]t would be strange to invest" the *Griffith dicta* about gaining a competitive advantage with great weight because the case "had nothing to do with vertical integration" and "certainly did not discuss either such integration or absolute refusals to deal").

4. Not surprisingly, most lower courts have understood that the *Berkey Photo* monopoly leveraging theory exceeds the scope of Section 2 and have flatly rejected the theory, correctly finding that it is inconsistent with the letter and purpose of the statute. *See Alaska Airlines*, 948 F.2d at 547; *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 203 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993); *Eleven Line, Inc. v. North Tex. State Soccer Ass'n*, 213 F.3d 198, 206 n.16 (5th Cir. 2000). Indeed, the Second Circuit itself had effectively interred the monopoly leveraging theory until the court of appeals' opinion in this case breathed new life into it. *See* pages 11-13, *infra*.

Prominent scholars also have rejected the monopoly leveraging theory. *See, e.g.*, 3A Areeda & Hovenkamp, ¶ 771c, at 173; *see also Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (per curiam) (reserving judgment on question in light of "substantial academic criticism cast upon the

leveraging concept") (citing, *e.g.*, Richard A. Posner & Frank H. Easterbrook, *Antitrust* 802-810, 870-871 (2d ed. 1981); Robert Bork, *The Antitrust Paradox* 365-366, 372-375 (1978)). This Court should do likewise and make clear that a mere allegation that a monopolist in one market gained a competitive advantage in a second market cannot state a claim under Section 2. The Court also should clarify that lower courts should not rely on the language in *Griffith* that has been read to suggest the contrary.[4]

B. The Monopoly Leveraging Theory Is Not An Appropriate Means Of Analyzing Section 2 Claims

The history of *Berkey Photo* and its progeny in the Second Circuit demonstrates that the monopoly leveraging theory had not been found, even by that court, to be an appropriate means for analyzing Section 2 claims prior to the instant case. From the very outset, the Second Circuit began to limit its monopoly leveraging theory, apparently realizing that it could not be applied as broadly as initially stated without improperly expanding the boundaries of Section 2.

1. In *Berkey Photo*, the Second Circuit set forth its broad description of the monopoly leveraging theory in an expansive introductory section of the opinion discussing

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[4] The confusion in the lower courts is most recently exemplified by *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3640 (U.S. March 20, 2003) (No. 02-1423), where the court of appeals relied on the "competitive advantage" language in *Griffith* and *Berkey Photo*, but adopted an even broader view, suggesting that three different theories of alleged anti-competitive behavior – the essential facilities doctrine, refusal to deal, and price squeeze – all constitute monopoly leveraging. *See id.* at 1284-1285, 1288. The Eleventh Circuit thereby viewed the essential facilities doctrine as a form of monopoly leveraging, whereas the court below treated the labels as identifying two independent bases for Section 2 liability.

the court's general conception of Section 2 doctrines. *See* 603 F.2d at 275-276. When it came to applying the monopoly leveraging theory to the facts before it, however, the court found the task to be quite difficult. First, the court had to clarify that Section 2 would be violated by a firm gaining a competitive advantage only if the firm did so by "use of the monopoly power it possessed in other segments of the industry," and not if that advantage was gained merely "by virtue of membership in an integrated [monopoly] firm." *Id.* at 291. The court described such prohibited "use of monopoly power" as "an action that a firm would have found substantially less effective, or even counterproductive, if it lacked market control." *Ibid.* In a second attempt to describe its test, the court of appeals explained that its analysis rested on "a simple proposition: if an action that gains a firm a competitive advantage is effective because of the company's efficiency, prestige, and innovativeness, and not because of its control over the market, the action is not a use of power." *Id.* at 292.

But the *Berkey Photo* court could not resolve that "simple" issue on the record before it, *ibid.*, notwithstanding that there had been four years of litigation, thousands of exhibits, and a trial that had lasted more than six months, *id.* at 268. The court acknowledged that, even on the facts of that case – where it found that the defendant had a monopoly in more than one market and where the defendant had gained a competitive advantage through the challenged conduct – the advantage "may have been attributable to its innovation of a new system of photography, and not to its monopoly power," and thus would not give rise to Section 2 liability. *Id.* at 292. At the same time, the court was unwilling to "dismiss the possibility" that the defendant's monopoly power was not "at least a partial root of its ability to gain an advantage." *Ibid.* Because the court could not "say with certainty on which side of this demarcation the facts f[e]ll," the court reversed and remanded for a new trial. *Ibid.*

2. Subsequent panels of the Second Circuit failed to provide a fuller explication of how courts are to distinguish between use of a firm's monopoly power and use of its efficiencies and innovativeness to achieve a "competitive advantage." Indeed, several subsequent opinions of that circuit read the monopoly leveraging theory even more narrowly and expressed doubt about its validity. For example, in *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990), the court dismissed *Berkey Photo*'s "competitive advantage" language as *dicta*; characterized that case as involving a tying claim; declared that the quoted language "requires tangible harm to competition" – not just competitors; and found no such evidence in the case before it. *Id.* at 570-571. In *AD/SAT v. Associated Press*, 181 F.3d 216 (2d Cir. 1999), the court directly questioned the "continued scope of monopoly leveraging claims as independent causes of action," in light of *Spectrum Sports*, 506 U.S. at 459; repeated *Twin Laboratories*' analysis of *Berkey Photo*; and found there was inadequate evidence of monopolizing conduct. *Id.* at 230-231.

Even more recently, in *Virgin Atlantic Airways Ltd. v. British Airways*, 257 F.3d 256 (2d Cir. 2001), the Second Circuit observed that it already had questioned the "competitive advantage" theory of monopoly leveraging, *id.* at 272, and explained that the requirement of *Spectrum Sports* for conduct that actually monopolizes or dangerously threatens to do so, "goes beyond 'gaining a competitive advantage' as set out in *Berkey Photo*." *Ibid.* The court determined that it was "unnecessary for [it] to decide, as a matter of law, the viability of a claim for monopoly leveraging as described in *Berkey Photo*," however, because the plaintiff lacked the requisite proof in that case. *Ibid.*

Accordingly, the experience of the Second Circuit in dealing with its *Berkey Photo* precedent does not commend adoption of that theory as an appropriate means of analyzing Section 2 claims. The court's attempts to narrow the theory by requiring tangible harm to competition and its

suggestion that a requirement of monopolization or dangerous threat thereof may be required amply demonstrate that the flaw in the theory is that it exceeds the scope of Section 2. Thus, as the Ninth Circuit observed when it, like the Third and Fifth Circuits, rejected the monopoly leveraging doctrine as an independent theory of liability: "If there is a dangerous probability that a monopoly will be created by leveraging conduct, then the conduct will be reached under the [traditional] doctrine of attempted monopoly" pursuant to Section 2. *Alaska Airlines*, 948 F.2d at 549; *see also Fineman*, 980 F.2d at 203; *Eleven Line, Inc.*, 213 F.3d at 206 n.16.

C. The Monopoly Leveraging Theory Undermines The Purposes Of The Sherman Act

1. The court of appeals' monopoly leveraging theory discourages monopolists and other large firms from entering new markets and engaging in conduct that would result in lower prices, better products, and more efficient production. For example, firms often vertically integrate from one market into a second market in order to lower their costs, and therefore their prices, and to provide integrated products that are more valuable to the consumer. *See, e.g.*, Posner & Easterbrook, *supra*, at 869 ("vertical integration is a potential source of substantial cost savings"). Courts and commentators have recognized that vertical integration by a monopolist, even if it drives competitors out of business, may be perfectly lawful because it "could (by lowering costs) lower prices, or, in any event, save economic resources." *Town of Concord*, 915 F.2d at 24 (citing 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 725d, at 201 (1978), and Bork, *supra*, at 243); *see also* 3A Areeda & Hovenkamp ¶¶ 757a-757c, at 23-27.

Under the court of appeals' monopoly leveraging theory, however, any such effort at vertical integration can become the basis for an antitrust claim on the ground that it harms competitors by giving the integrated firm a

"competitive advantage" (regardless of whether it results in the acquisition or enhancement of monopoly power in the second market through predatory conduct). Firms that are potentially subject to such claims will be deterred from seeking the efficiencies of vertical integration, knowing that the reward for such conduct may be lengthy and costly antitrust litigation and, potentially, treble damages and a court order prohibiting them from making use of those efficiencies to compete in the second market. *See* Richard A. Posner, *Antitrust Law* 224 (2d ed. 2001) ("Were vertical integration deemed a suspect practice under the antitrust laws because of its potential exclusionary effect, all commercial activity would be placed under a cloud as the courts busied themselves redrawing the boundaries of firms, even though the normal motivation for and consequence of vertical integration are merely to reduce the transaction costs involved in coordinating production by means of contracts with other firms.") (footnote omitted).

2. The court of appeals' monopoly leveraging theory does nothing to benefit consumers. As courts and commentators have pointed out, "the extension of monopoly power from one to two levels does not *necessarily*, nor in an *obvious* way, give a firm added power to raise prices." *Town of Concord*, 915 F.2d at 23. That is because "there is but one optimal monopoly profit to be gained from the sale of an end-product." 3A Areeda & Hovenkamp ¶ 756b2, at 13; *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 36 (1984) (O'Connor, J., concurring in the judgment) (noting that that economic theory is "widely accepted" and "easily demonstrated") (citing Phillip Areeda, *Antitrust Analysis* 735 (3d ed. 1981), and Bork, *supra*, at 372-374). *See also* Bork, *supra*, at 229 ("vertically related monopolies can take only one monopoly profit"); Posner & Easterbrook, *supra*, at 870 ("There is only one monopoly profit to be made in a chain of production"); *Town of Concord*, 915 F.2d at 21, 32-33 (App. A) (explaining this "counterintuitive" result). And to the extent that conduct expanding a monopoly from one market to a second market does harm consumers by expanding the

firm's monopoly power, such conduct is actionable under the traditional rubric of Section 2.

II. THE ESSENTIAL FACILITIES DOCTRINE IS NOT AN INDEPENDENT BASIS FOR LIABILITY UNDER SECTION 2 OF THE SHERMAN ACT

A. The Essential Facilities Doctrine Extends To Conduct Beyond The Reach Of Section 2

1. The court of appeals purported to recognize that a monopolist does not have a duty to cooperate with its competitors, Pet. App. 28a, but then concluded that "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete in a given market." *Id.* at 29a. The court went on to hold that respondent stated a Section 2 claim under that "essential facilities doctrine" by alleging that petitioner failed to provide its competitor (the company that provided respondent local telephone service) reasonable access to its "local loop" which, according to respondent, was essential to competing in the market for local telephone service and would be prohibitively expensive for others to create independently. *Ibid.*

This Court has indicated, however, that, "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of a trader or manufacturer * * * freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *see also Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). The court of appeals' use of an imprecise label therefore led it to erroneously hold that any allegations that satisfy its "essential facilities" doctrine provide an independent basis for a Section 2 claim.

2. One of the reasons the court of appeals may have been led to apply its essential facilities doctrine in this case is because of the duties that the Telecommunications Act of 1996 (Telecommunications Act), Pub. L. No. 104-104, 110 Stat. 56, places on petitioner and other local exchange carriers. For example, that law requires local exchange carriers to provide any requesting telecommunications carrier "nondiscriminatory access to network elements on an unbundled basis * * * on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the [parties' interconnection] agreement and the requirements of" 47 U.S.C. §§ 251, 252. 47 U.S.C. § 251(c)(3). The Telecommunications Act contains its own comprehensive remedial scheme. The governing interconnection agreement in this case provided for an exclusive dispute resolution procedure to govern any disputes between petitioner and respondent's local telephone service provider that arose out of the agreement. Pet. App. 5a. Moreover, the FCC maintains regulatory authority over certain local exchange carriers, such as petitioner. *See* 47 U.S.C. § 257(d)(6). Indeed, the very conduct challenged by respondent in this case led to an FCC consent decree under which petitioner agreed to pay $3 million to the United States and $10 million to respondent's local telephone service provider and other similarly situated carriers. Pet. App. 5a.

But such an obligation imposed by a regulatory scheme cannot support a claim for violation of Section 2 of the Sherman Act. Before enactment of the Telecommunications Act, petitioner had no duty under the antitrust laws to enable firms to compete against it in the provision of local telephone service by granting them access to its wiring and telecommunications network. And Congress expressly declined to expand the scope of the antitrust laws by virtue of the Telecommunications Act. *See* Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56, 143 (providing that nothing in the Act "shall be construed to modify, impair or supersede the applicability of any of the antitrust laws");

Cavalier Telephone, LLC v. Verizon Va., Inc., No. 02-1337, slip op. at 19 (4th Cir. May 20, 2003). The court of appeals apparently recognized the inappropriateness of relying on a duty from a regulatory scheme to create a novel duty under the antitrust laws and found, instead, that petitioner's duty to provide its competitor access to its facilities arose from Section 2 of the Sherman Act. *Cf.* Pet. App. 29a (acknowledging that alleged conduct might also violate the Telecommunications Act).

The court of appeals failed, however, to articulate the elements of the Section 2 essential facilities claim it recognized. It simply cited a decision from another circuit, *see* Pet. App. 29a (citing *Southern Pac. Communications Co. v. AT&T*, 740 F.2d 980, 1009 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985)), and quoted it as describing *United States v. Terminal Railroad Ass'n*, 224 U.S. 383, 411 (1912), to require a monopolist "to provide competitors with reasonable access to 'essential facilities,'" upon "just and reasonable terms." But *Terminal Railroad* did not use the "essential facilities" terminology and did not adopt the doctrine. Indeed, that case did not even involve single-firm conduct. Rather, it involved the very different situation of joint action by multiple rivals and the question the Court addressed was whether their conduct "resulted in a combination which is in restraint of trade" in violation of Sections 1 and 2 of the Sherman Act. *See Terminal R.R.*, 224 U.S. at 394. The admission of another rival to the joint venture was imposed as a remedy. *Cf. id.* at 409-410 (discussing a finding of attempted monopolization in course of remedy analysis).

3. This Court "has never adopted" the essential facilities doctrine. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part). The Court has declined to address the possible applicability of the doctrine even when the court below relied on it. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985).

Various lower courts, however, have described the doctrine as requiring a firm with monopoly power in one

market to share its assets with competitors in a related non-monopoly market in certain circumstances. The Seventh Circuit in *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (1983), *cert. denied*, 464 U.S. 891 (1983), articulated a four-part test for determining when the doctrine should be applied and other courts have purported to adopt the test.[5] Those decisions should be rejected.

The antitrust laws rest upon the well-established economic principle that aggressive competition among rivals, not the forced sharing of competitive assets, will maximize consumer welfare. *See United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 116 (1975). Because the essential facilities doctrine suggests that the antidote to monopoly is cooperation, not competition, it is inherently dangerous and should not be adopted by this Court.

The essential facilities doctrine has been widely criticized by both courts and commentators, including by subsequent decisions of the Seventh Circuit. Judge Posner has emphasized, for example, that "[c]onsumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors." *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996). Rather, it is in the interest of consumers to permit a lawful monopolist to reap the full economic benefit of its position, because those supra-competitive rewards will encourage potential competitors to compete aggressively to dislodge the monopolist. *See ibid.* Judge Posner also has pointed out that other noted antitrust scholars have criticized "the decisions in the essential-facilities line" as "having nothing to do with the purposes of the antitrust law." *See id.* at 1412

[5] The *MCI* test requires the following elements: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI*, 708 F.2d at 1132-1133.

(citing Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition And Its Practice* § 7.7 (1994); Phillip Areeda, *Essential Facilities: An Epithet In Need Of Limiting Principles*, 58 Antitrust L.J. 841 (1990); Scott D. Makar, *The Essential Facility Doctrine and the Health Care Industry*, 21 Fla. St. U. L. Rev. 913 (1994)).

Some lower courts have attempted to limit the essential facilities doctrine, apparently in an effort to bring it closer to the text and purpose of Section 2. For example, some courts have applied the doctrine to instances where, absent access to the monopolist's facilities, a competitor cannot compete at all in a secondary market, but have not allowed an essential facilities claim to be based on a mere difficulty in competing on terms that are less favorable than the monopolist's own access to its facilities. *See Alaska Airlines*, 948 F.2d at 545-546; *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 648-649 (10th Cir.), *cert. denied*, 506 U.S. 831 (1992), *overruled in part on other grounds by Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (en banc); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544-545 (4th Cir.), *cert. denied*, 502 U.S. 814 (1991). Other courts, including the Seventh Circuit, appear to view a facility as "essential" only if it cannot be duplicated because the monopoly is a natural monopoly, is legally protected from competition, or is publicly subsidized. *See, e.g., MCI*, 708 F.2d at 1133; *Marshfield Clinic*, 65 F.3d at 1412; 3A Areeda & Hovenkamp ¶ 773b, at 202. Those attempts to cabin the doctrine have not, however, succeeded in creating a manageable legal standard justified by a coherent economic theory so as to warrant adoption by this Court.[6]

[6] Some commentators similarly have suggested that the essential facilities doctrine, if it were to be recognized at all, should be limited to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately." *Twin Labs.*, 900 F.2d at

(Continued on following page)

The application of the doctrine by the court below compounded the problem by striking out in the other direction and broadening the essential facilities doctrine beyond what any other court had done. In holding that petitioner is obligated, not merely under the Telecommunications Act, but also under Section 2, to provide competitors with access to its local loop, the court of appeals' ruling would require a firm to create a wholesale market to sell its product or service to a rival at a discount so that that rival can then turn around and resell the product or service at retail in direct competition with the firm. No other court has held that a lawful monopolist must provide a competitor access to its facilities in order to create competition in the monopoly market. *See, e.g., Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1464, 1484 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) ("penaliz[ing] the monopolist for refusing to surrender a lawfully obtained monopoly" is "a result courts have long foresworn").

That is what the Seventh and Fourth Circuits have correctly recognized is not required by the antitrust laws. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 398 (7th Cir. 2000) ("even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor") (quoting *Aspen Skiing*, 472 U.S. at 600); *Cavalier Tel., LLC v. Verizon Va., Inc.*, No. 02-1337, slip op. at 18 (4th Cir. May 20, 2003); *see also MCI*, 708 F.2d at 1133, 1148-1149 (requiring AT&T to provide MCI access to its local telephone network so as to enable MCI to compete

569 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 736.2, at 680-681 (1988 Supp.)); *see also* 3A Areeda & Hovenkamp ¶ 771c, at 173 ("only three situations in which an essential facilities doctrine is even arguably appropriate"). These commentators also, however, recognize the heavy costs that the doctrine would impose and the minimal benefits it would yield and ultimately conclude that the doctrine should be rejected. *See ibid.*

in the long-distance market (not in the local telephone market), but denying MCI's claim for access to AT&T's long-distance network even though such access also would have improved MCI's ability to compete in long-distance market).

Moreover, the required creation of a wholesale market would mean, in essence, that a firm would be made to alter the inherent nature of its business. Such a requirement has been correctly rejected by other courts as not mandated by Section 2. *See Laurel Sand & Gravel*, 924 F.2d at 545 (finding no liability under essential facilities doctrine because whether it is feasible for monopolist to provide access "must be analyzed not in terms of all the possibilities" of the firm, but in the context of its normal course of business).

Prominent scholars have declared that "the essential facility doctrine is both harmful and unnecessary and should be abandoned." 3A Areeda & Hovenkamp ¶ 771c, at 173. This Court should conclude likewise and decline to adopt the doctrine.

B. Ample Legal Means Already Exist To Redress Any Unlawful Anticompetitive Conduct That Results From Control Of A Particular Facility

There is no cause for the Court to adopt the essential facilities doctrine in any form because allegations of truly anticompetitive conduct, including conduct that involves the control of a particular facility, can be adequately redressed under traditional Section 2 standards or through regulation.

1. This Court's decisions in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), illustrate well the use of traditional Section 2 analysis in the context of a unilateral refusal to deal.

As noted above, the *Aspen Skiing* Court explicitly withheld judgment on the applicability of the essential

facilities doctrine, notwithstanding the court of appeals' reliance on it in that case. *See* 472 U.S. at 599, 611 n.44. Instead, the Court addressed whether the record evidence supported the jury finding that the defendant's refusal to deal constituted predatory conduct to maintain monopoly power under the traditional Section 2 standards.

Aspen Skiing met that criterion because it involved a company that not only discontinued a longstanding practice of joint-ticket packages (notwithstanding that the practice had benefited it economically in the past), but the company also then refused to sell its own tickets to the competitor "at the tour operator's discount or at retail," *id.* at 593, and refused to accept full-price coupons from the competitor's customers (guaranteed by funds on deposit at a local bank) in exchange for its daily tickets, *id.* at 594. That combination of actions made it impossible for the competitor to market its own joint-ticket. *Id.* at 607-608. The company's conduct thereby eliminated from the market a product that was preferred by consumers and "consumers were adversely affected by the elimination" of the product. *Id.* at 606. Also, the company engaged in a national advertising campaign that "strongly implied" a falsehood that its mountains were the only ski mountains in the area. *Id.* at 593. The company thus attempted to expand its monopoly power through predatory conduct by excluding competition "on some basis other than efficiency." *Id.* at 605.

Similarly, the Court in *Otter Tail* did not invoke an "essential facilities" doctrine, but rather affirmed the district court's straightforward application of Section 2 to find that the defendant, an electric utility company, had "attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act." 410 U.S. at 368. The Court did not rely solely on the fact that the defendant refused to sell its energy at wholesale to potential rivals (municipal power systems that were former retail customers). The Court also relied on the fact that the defendant refused to

wheel (carry) power from other suppliers of wholesale energy who were willing to supply it to the potential rivals but needed such wheeling by the defendant to reach the rivals. *Id.* at 377. The Court confirmed the district court's determination that the defendant thereby used its "strategic dominance * * * to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." *Id.* at 377 (quoting *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 60 (D. Minn. 1971)).

The *Otter Tail* Court emphasized that such use of monopoly power "to destroy threatened competition" constitutes attempted monopolization in violation of Section 2. 410 U.S. at 377 (citation omitted). The Court expressly found that the record supported the district court's finding that the defendant's "refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position." *Id.* at 378.

Both *Aspen Skiing* and *Otter Tail* therefore teach that traditional Section 2 standards are adequate to impose liability to the extent unilateral denial of access maintains or enlarges monopoly power through predatory or exclusionary means (*i.e.*, if the conduct makes economic sense only insofar as it would eliminate competition). *See also* Br. U.S. & FTC Supporting Pet. Cert. at 12, 13.[7]

[7] Although the Seventh Circuit applied the essential facilities doctrine in *MCI*, *see* page 19 & note 5, *supra*, that court also relied heavily on *Otter Tail* as "an analogy" and described that case not as applying an "essential facilities" label, but as focusing on the traditional Section 2 concern that a defendant had used its monopoly power "to further a monopoly in another market." 708 F.2d at 1133. Such traditional Section 2 analysis also would have been adequate to resolve the problem before the court in *MCI*. *See* 3A Areeda & Hovenkamp ¶ 771c, at 173 ("In virtually every instance where competitive problems can be effectively addressed by forcing the monopolist to deal, traditional doctrine of refusal to deal is sufficient to the task.").

2. Regulation is an even more typical means of addressing concerns about access to a lawful monopolist's facilities. In fact, it is generally the case that unilateral refusals to deal by lawful monopolists are thought to be best addressed through "[g]overnment regulation, as opposed to treble damages and criminal liability under the Sherman Act." *Alaska Airlines*, 948 F.2d at 548 (citing William K. Jones, *Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries*, 65 Cornell L. Rev. 303, 304 (1980)). That is because a true essential facility is, by definition, a natural monopoly,[8] and the competitive problems posed by a natural monopoly cannot be remedied by market forces (except, perhaps, in the very long run). Regulation, therefore, is the only practical means of forcing a natural monopolist to expand market output and reduce market price. In these circumstances, application of traditional Section 2 unilateral refusal to deal analysis is necessary only as a means to capture conduct that cannot be redressed through regulatory remedies. Commentators have explained that that was the case in *Otter Tail*, where the federal regulatory agency "lacked the authority to order wheeling of wholesale power, and the Court used antitrust to fill this regulatory vacuum." 3A Areeda & Hovenkamp ¶ 772b3, at 181 (footnote omitted).

Regulation also is a better means for resolving problems of access to natural monopolies because, otherwise, courts (instead of regulators) will be called upon to make judgments about exactly which assets a firm must be

[8] A natural monopoly arises in a market in which consumer demand will support only one efficiently-scaled firm. In such a market, the costs of production are significantly lower with a single producer, and that producer can earn larger profits by charging less than would be charged by several less efficient firms. *See Alaska Airlines*, 948 F.2d at 548 (citing 3 Areeda & Turner ¶ 621a, at 47-48 (1978)); *see also* 3 Areeda & Hovenkamp ¶ 658b, at 121.

forced to share with a competitor and the terms, including price, on which such sharing must take place. One of the principal problems with courts setting prices is that "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow." *Town of Concord*, 915 F.2d at 25 (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)). Therefore, lower courts would be required to continue to monitor and enforce such orders. "Such a solution is nothing less than price regulation of the kind undertaken by regulatory agencies – something for which both the federal courts and the antitrust litigation process are extremely ill-suited." 3A Areeda & Hovenkamp ¶ 771b, at 172.

In short, it is not for the courts to serve the role of legislature or regulatory commission. If economic interests or public demand calls for particular facilities to be shared, the legislature can mandate such sharing either directly or through the adoption of a regulatory scheme to be overseen by an agency equipped to determine the appropriate prices to be charged and the terms of access to the facility. Congress and state and local legislatures can and have enacted legislation to address such issues, including the Telecommunications Act which imposes particular duties on petitioner and required petitioner to remedy an alleged violation of the statute.

C. The Essential Facilities Doctrine Runs Contrary To The Aims Of The Sherman Act By Requiring Competitors To Share Resources

1. The essential facilities doctrine discourages competition by all firms – large and small – by creating the prospect of forced sharing of business assets. Indeed, by requiring firms to cooperate with one another through the sharing of resources and common costs, the doctrine promotes precisely the kind of coordination between firms that is the concern of Section 1 of the Sherman Act. *See, e.g., Copperweld*, 467 U.S. at 767-768.

The essential facilities doctrine serves to deter large firms from engaging in procompetitive conduct that benefits consumers. First, companies will not compete aggressively to build efficiently-scaled businesses if the cost of success is that they must share the fruits of their labors with rivals. 3A Areeda & Hovenkamp ¶ 773e, at 212 ("the [essential] facility, which is admittedly desirable, might not have come into existence had a sharing requirement existed when the investment was made"). In addition, firms potentially subject to an "essential facilities" claim will be reluctant to "undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement." *AT&T Corp.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part). Under the court of appeals' rule, rivals who do not bear any of the costs or risks of developing innovative ideas, products or businesses will be able to share in those investments.

Second, the essential facilities doctrine will discourage firms that control an arguably "essential" facility from vertically integrating into a related market – even if such integration would result in lower costs and prices to consumers. A firm that does so would immediately subject itself to attack by competitors in the related market, who would demand access to the firm's "essential" assets and resources. These effects will be magnified if the Court endorses the court of appeals' unprecedented conclusion that Section 2 may be invoked to force a firm that competes in only one market to create a separate wholesale market for its product or service so that would-be rivals may compete with it on equal terms. Under that rule, any company that develops an innovative or successful product or service would be subject to an essential facilities claim.

Competitive conduct by smaller firms also is discouraged by the essential facilities doctrine because smaller rivals will have little incentive to compete aggressively to

develop products and services that may displace an incumbent monopolist if they can invoke the Sherman Act to gain access to the monopolist's assets. 3A Areeda & Hovenkamp ¶ 771b, at 172 ("the right to share a monopoly discourages firms from developing their own alternative inputs").[9]

2. If this Court were to adopt the essential facilities doctrine as an independent Section 2 standard and authorize lower courts to force competitors to share resources, the adverse effects on economic efficiency would permeate every sector of the economy. As the courts of appeals have demonstrated, it is difficult to define and implement uniform standards for the essential facilities doctrine. Such uncertainty regarding the scope of the doctrine already has led to a proliferation of cases with varying and conflicting constructions of the doctrine. That would undoubtedly continue, especially if, as the court of appeals here held, those cases can be brought by class action plaintiffs seeking treble damages.

Since this decision, more than two dozen additional cases have been filed against incumbent local telephone companies. *See* Pet. 28 n.22. Plaintiff class actions are now being pursued based on similar theories against firms in other industries as well. *See, e.g., Yankees Ent'mt & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d

[9] The essential facilities doctrine does not benefit consumers by reducing price. See p. 19, *supra*. Commentators explain that, for a variety of reasons, "when [an essential facility] is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone." 3A Areeda & Hovenkamp ¶ 771b, at 171-172. For example, so long as a monopolist is able to charge a monopoly price for access to its facilities, it will prevent rivals from achieving cost savings, expanding output, or lowering price. Even if a court acts as a regulator and requires the monopolist to charge a lower price for access, there is no assurance that this will result in lower prices to the consumer because the firms sharing the monopoly asset may simply maintain the monopoly price and share the monopoly profits. *Ibid.*

657, 671-673 & n.12, 674-675 (S.D.N.Y. 2002) (expressly relying on decision by court of appeals in the instant case to deny motion to dismiss a Section 2 claim under monopoly leveraging theory and essential facilities doctrine, based on allegations that a cable operator refused to grant a regional sports programmer "carriage on its system on nondiscriminatory terms such as those terms and conditions available to its affiliates," *id.* at 664, which caused the latter to have fewer viewers and less revenue); *In re EVIC Class Action Litig.*, No. 02-Civ-2703, 2002 WL 1766554, at *12-14 (S.D.N.Y. July 30, 2002) (expressly relying on decision by court of appeals in the instant case to deny motion to dismiss a Section 2 claim under monopoly leveraging theory and essential facilities doctrine, based on allegations that UPS offered package insurance to its customers, but denied other potential package insurers access to the shipping forms and software that UPS provides to its customers).

The court of appeals' construction of Section 2 will "chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.*, 475 U.S. at 594. The Court should reject that construction and confirm, instead, that Section 2 is meant to foster aggressive competition on the merits by prohibiting only predatory or exclusionary conduct that monopolizes or attempts to monopolize a relevant market. *See Spectrum Sports*, 506 U.S. at 458-459.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether this Court's narrow precedents on antitrust duties to deal should be extended to encompass the alleged conduct at issue here where the uniquely comprehensive and detailed regulatory regime established by the Telecommunications Act of 1996 prevents any significant competitive harm and extension of antitrust law would disrupt the implementation and enforcement of that statute.

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The United States Telecom Association ("USTA") respectfully submits this brief as *amicus curiae* in support of Petitioner Verizon Communications Inc., urging reversal of the judgment of the U.S. Court of Appeals for the Second Circuit.[1/]

INTEREST OF AMICUS CURIAE

USTA is the principal trade association for the local telephone industry in the United States. Founded more than a century ago, USTA currently represents more than 600 small, mid-sized, and large local exchange carriers. Collectively, USTA's members operate more than eighty percent of the nation's local access lines. The decision below recognizes a treble-damages cause of action under section 2 of the Sherman Act for claims involving the duties imposed by the Telecommunications Act of 1996 ("1996 Act" or "Act")[2/] on incumbent local exchange carriers to assist their competitors by sharing their facilities. Because many of USTA's members are subject to the extensive sharing requirements of the 1996 Act and the evolving implementation and enforcement of those requirements by the responsible regulatory agencies, this Court's decision will directly affect USTA and its members.

SUMMARY OF ARGUMENT

USTA agrees with petitioner that the Second Circuit erred in interpreting section 2 of the Sherman Act to impose a duty on incumbent local phone companies to provide affirmative assistance to their competitors. USTA writes to

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[1/] This brief was prepared in its entirety by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae*, its members, and its counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

[2/] Pub. L. No. 104-104, 110 Stat. 56 (*codified at* 47 U.S.C. § 151 *et seq.*).

emphasize that, in light of the comprehensiveness of the regulatory regime established by the 1996 Act and its implementing regulations, as well as the enforcement of that regime by federal and state regulators, interpretation of the antitrust laws in this manner is not only inappropriate, but affirmatively harmful.

1. The determination whether to impose antitrust liability must take into account the degree to which a regulatory regime already protects against competitive harm. The regulatory regime under the 1996 Act unambiguously and comprehensively regulates the sharing of incumbent carriers' facilities, and the antitrust laws accordingly should not be extended to do the same. The 1996 Act regime does not simply guard against anticompetitive conduct—the aim of the antitrust laws—but attempts to jump-start new entry by affirmatively obligating incumbent carriers to share their facilities with their competitors. The introduction of a new antitrust cause of action into this regulatory arena would impede the implementation and enforcement of the Act by the agencies Congress entrusted with those tasks.

2. The regulatory regime under the 1996 Act is one of the most comprehensive and complex Congress has ever adopted. The Act imposes detailed obligations on incumbents to share facilities at regulated prices, and it charges the FCC with elaborating those obligations further by rule. In doing so, the FCC must balance the competing statutory objectives of promoting entry based on resale of the incumbent's facilities but also preserving incentives for investment and facilities-based competition. This task has proven to be an enormous and evolving one, requiring prolonged rulemaking proceedings that remain in process to this day. The statute requires incumbents to negotiate sharing agreements with new entrants and empowers state regulatory commissions to resolve disputed issues by arbitration and to establish prices consistently with the discounted pricing methodology prescribed by the FCC. The agreements and arbitrations cover many hundreds of details

of the sharing arrangements between each incumbent and each new entrant. This regime is vigorously enforced by the FCC and state commissions, as the facts of this case demonstrate. The antitrust courts are not suited for this type of comprehensive oversight, and, in any event, the regulatory regime makes it unlikely that any competitive harm could remain undetected or unaddressed for any sustained period of time.

ARGUMENT

I. The Regulatory Regime Created by the 1996 Act Makes Extension of This Court's Narrow Antitrust Duty-to-Deal Precedents to the Alleged Conduct at Issue Both Inappropriate and Harmful.

As petitioner shows, the antitrust laws are *not* implicated by the alleged conduct at issue in this case. This is particularly clear when the antitrust analysis is informed by the fact that such conduct is subject to the uniquely comprehensive and detailed regulatory regime established by the 1996 Act and the FCC's implementing regulations. That regime assures new entrants access to many of the incumbent carriers' facilities and services, thereby eliminating any justification for stretching the antitrust laws to assure such access. In these circumstances, interpreting the antitrust laws either to require additional access or to impose additional penalties for failure to provide access would only interfere with the FCC's and state public utilities commissions' implementation and enforcement of the regulatory regime that Congress devised specifically for the telecommunications industry.

A. The Comprehensive Regulatory Regime Already Protects Against Antitrust Harm.

As petitioner shows, section 2 of the Sherman Act has never been interpreted to impose a duty to deal with or assist

competitors beyond extremely narrow circumstances that are not present here.[3/] The courts have instead determined that "even a monopolist is entitled to compete," and "[p]art of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal."[4/] Thus, courts should use the "utmost caution" when evaluating unilateral conduct under the antitrust laws "lest the law forbid desirable, robust competition[.]"[5/] Courts should be especially hesitant to expand antitrust law to impose affirmative duties on incumbents to share their facilities with competitors, as such duties can actually reduce competition by dissuading competitors from "building facilities [that] benefit consumers"[6/] or otherwise "developing their own alternative inputs."[7/]

In this case, the regulatory regime created by the 1996 Act and its implementing regulations—which, as detailed in Part II below, protect comprehensively against competitive harm—provide further reason that antitrust law should not be extended to impose an affirmative duty on incumbent carriers to assist their competitors. Where an industry is so regulated, this Court has long recognized that the regulatory regime must be taken into account in any analysis of whether antitrust law should be construed to impose liability for specific conduct.[8/] As numerous courts and commentators

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[3/] *See* Brief of Petitioner Verizon at 15-29.

[4/] *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000).

[5/] *Id.*; *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).

[6/] P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 851 (1989).

[7/] P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 771(b), at 172 (2d ed. 2002).

[8/] *See, e.g., United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 627 (1974) (courts "must take into account the unique federal and state restraints on [defendant's conduct]. Failure to do so would produce misconceptions that go to the heart of the [antitrust] doctrine itself").

have emphasized:

> Antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.[9/]

Consideration of the regulatory regime is particularly appropriate in the unique circumstances here. Congress expressly chose to end antitrust court supervision of the telecommunications industry under the AT&T Consent Decree[10/] to eliminate continued stewardship of an entire industry by the courts. Congress instead opted to establish a "national policy framework,"[11/] gave the FCC the responsibility to ensure a competitive environment, and equipped it with an elaborate statutory toolbox to achieve that end. "Compared to its authority under the Communications Act of 1934, the FCC was given a much stronger role under the 1996 Act in regulating the telecommunications industry."[12/]

[9/] *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1106 (7th Cir. 1983) (quoting 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 223d (1978)); *see also Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1990) ("[A]ntitrust analysis must sensitively 'recognize and reflect the distinctive economic and legal setting' of the regulated industry to which it applies.") (quoting Watson & Brunner, *Monopolization by Regulated 'Monopolies': The Search for Substantive Standards*, 22 Antitrust Bull. 559, 565 (1977)).

[10/] Telecommunications Act of 1996 § 601, 47 U.S.C. § 152.

[11/] H.R. Conf. Rep. No. 104-458; 142 Cong. Rec. H1078 (Jan. 31, 1996).

[12/] *Cavalier Tel., LLC v. Verizon Va., Inc.*, No. 02-1337, Slip Op. at 15 (4th Cir. May 20, 2003).

The question here is not whether the regulatory regime establishes *immunity* from antitrust suit. The intricate and extensive regulatory scheme established under the 1996 Act requires incumbent carriers to assist their competitors to a far greater degree than antitrust law requires. "[T]he 1996 Act imposes duties on the [incumbents] that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either; they are simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets."[13/]

The issue instead is whether the policy of the Sherman Act requires extending section 2 to reach the conduct at issue here. The answer is no. As we show below, the regulatory regime established by the 1996 Act includes robust state and federal enforcement mechanisms that are explicitly designed, and are more than adequate, to protect against the types of competitive harm that respondent's case asserts. This is not a situation in which the regulatory statute has left a vacuum that antitrust law must fill.[14/] To the contrary, the regulatory enforcement mechanisms have been extremely effective. In this case, as detailed in Part II, those mechanisms promptly detected and addressed the alleged misconduct. More generally, the Act has been so effective that the FCC, with advice from the Antitrust Division of the Department of Justice, has found that local telephone markets in New York,

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[13/] *Goldwasser*, 222 F.3d at 401; *see also Cavalier Tel.*, No. 02-1337, Slip Op. at 17 ("By 'jump-starting' and 'accelerating' the creation of competition in the local markets through enactment of §§ 251 and 252 of the Telecommunications Act, Congress imposed more dramatic obligations on the local monopolies than would have been imposed simply by subjecting them to preexisting antitrust liability.").

[14/] Where courts have permitted antitrust actions to proceed against companies that are extensively regulated, the particular conduct that gives rise to the antitrust liability typically has not yet been addressed by federal or state regulators. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *MCI Communications*, 708 F.2d at 1103.

and in forty other states, have been "fully and irreversibly" opened to competition.[15/] Thousands of sharing agreements have been concluded under the Act,[16/] and competitors now serve over eleven percent of the nation's switched access lines.[17/]

As then-Judge Breyer explained in rejecting an antitrust claim against a regulated utility, "regulation dramatically alters the calculus of antitrust harms and benefits. . . . [R]egulation significantly diminishes the likelihood of major antitrust harm." *Town of Concord*, 915 F.2d. at 17, 25. In this case, the existence of extensive regulatory duties and their enforcement by federal and state regulators significantly reduce the likelihood of antitrust harm and eliminate any justification for stretching antitrust law to reach this case.

B. Expansion of Antitrust Law with Respect to Conduct Regulated under the 1996 Act Would Interfere with Implementation and Enforcement of the Act.

This Court has long recognized that federal agencies "entrusted with regulation in the public interest" must be allowed to "carry out that responsibility free from the

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[15/] *See e.g.*, Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3964 ¶ 24 (1999) ("New York 271 Order").

[16/] As of 2000, "[m]ore than 6,000 interconnection agreements ha[d] been signed." News Release, USTA, '96 Telecom Anniversary: At Four Year Mark, Markets Open to Competition, But Local Telcos Still Victims of Regulatory Favoritism (February 7, 2000), *available at* http//www.usta.org/releases/rls00-03.html.

[17/] News Release, *Federal Communications Commission Releases Data on Local Telephone Competition*, Dec. 12, 2002, *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom1202.pdf (as of June 2002, CLECs served 21.6 million switched access lines).

disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws."[18] And regulated entities "should not be required to act with reference to inconsistent standards of conduct."[19] Expansion of antitrust liability to reach the conduct at issue here would almost certainly generate such disruption and inconsistent standards of conduct: The courts' decisions would interfere with the FCC's and the state agencies' evolving implementation of regulatory policies responsive to the competing goals Congress sought to achieve in the Act.

As explained below, the FCC and state agencies have had to confront and answer myriad issues in implementing the Act's unbundling requirements. The answers the agencies have developed reflect their continued efforts to balance the competing goals of the Act in light of the guidance provided by court rulings,[20] developments in the marketplace, and experience with the success of various regulatory approaches.[21]

Creation of a new antitrust cause of action would require judges and juries to address these same issues under the standards of section 2. The facts of this case illustrate some of the detailed questions that antitrust courts would face: A temporary lapse occurred in the functioning of new software that Bell Atlantic had installed to satisfy a regulatory obligation to give competitors electronic confirmation that

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[18] *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 734 (1975); *see also Otter Tail*, 410 U.S. at 376 (concluding that the antitrust remedy there imposed by the district court did not "conflict with the authority" of the federal regulatory agency).

[19] *Phonetele Inc. v. AT&T Co.*, 664 F.2d 716, 732 (9th Cir. 1981).

[20] *See, e.g., Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *United States Telecom Ass'n ("USTA") v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[21] *See USTA*, 290 F.3d at 418-422 (recounting the history of the *Local Competition Order*, this Court's *vacatur* of that order, the *UNE Remand Order*, and the *Line Sharing Order*).

their orders had been processed. The complaint asks a court to impose, under the antitrust laws, additional and different remedies beyond those already imposed by the regulators. And this is simply one of countless disputes that arise in connection with the forced sharing of incumbents' facilities. The responsible agencies have prescribed, and are enforcing, many hundreds of similar obligations, performance metrics, and other requirements, which evolve over time. Because antitrust courts lack the industry expertise and detailed statutory guidance that the regulatory agencies possess, courts and the agencies would almost inevitably define the incumbents' particular unbundling duties differently, and the rulings of antitrust courts would be unlikely to mirror or even fit with the determinations made by the responsible agencies.

The result would be greater confusion for industry participants and interference with the regulators' ability to carry out their statutory mandate. If, for example, antitrust law were to be interpreted to treat the 1996 Act's requirements as a floor, with additional sharing obligations to be added piecemeal under section 2, the FCC's (and the states') ability to administer the competing goals dictated by Congress for the telecommunications industry would be impaired. To take just one aspect of the Act's regulatory regime, as described further below, the FCC must apply specific statutory standards in determining which facilities incumbents must share with their competitors. As the courts have made clear, "unbundling is not an unqualified good," and the Act therefore requires the FCC to analyze the "reasonable trade-offs" between any benefits of more unbundling and the "disincentives" to investment that would be created by too much unbundling. *USTA*, 290 F.3d at 425, 429. Thus, an FCC decision *not* to require unbundled access to a particular facility (or to require it only in certain circumstances) reflects a substantive determination that requiring such access (or unlimited access) would be harmful because, for example, it would discourage facilities-based competition or would deter the incumbent's own investment.

If a court nonetheless were to determine in an expansive application of antitrust law that an incumbent *was* required to share that same facility, its decision would impede the regulator's ability to achieve the goals of the statutory scheme. Thus, as the FCC's general counsel has observed, "[i]t's difficult to imagine how a private case getting into this 'essential facilities' issue . . . is not going to bump up quite seriously into what the [FCC] is doing. . . . [U]nquestionably there is going to be a lot of tension."[22]

Even apart from the creation of new or different duties under antitrust laws, the prospect of independent antitrust liability would interfere with regulators' enforcement responsibilities. The FCC and state commissions make complex and nuanced policy decisions in enforcing the duties imposed by the 1996 Act. They must calibrate any penalties and mandatory relief to balance considerations such as how to deter future violations, what effect a particular penalty will have on carriers' incentives, and how best to tailor requirements to promote the goals of the Act. Further, the regulatory agencies must monitor how their enforcement decisions are working in practice, both to ensure a carriers' compliance and to make appropriate adjustments as the marketplace changes. As Congress implicitly recognized in adopting the 1996 Act, antitrust courts are as ill-equipped to do such ongoing remedial fine-tuning as they are to define the underlying sharing duties. As a result, a decision by an antitrust court—even if did not impose a conflicting or new substantive duty—would frustrate the FCC's and state agencies' joint implementation of a single, consistent

[22] Center for Legal Policy at the Manhattan Institute, *The New Class Action Targets: Are Class Actions Undermining Regulations in the Fields of Financial Services, High Technology, and Telecommunications?*, Panel 2: Regulators' Roundtable, p.16, October 30, 2002, *available at* http://www.fed-soc.org/Publications/Transcripts/classactions2.pdf.

enforcement regime under the Act.[23]

Even the threat of independent antitrust liability for conduct regulated by the Act—particularly the threat of treble damages in a class action—could deter incumbents from seeking to resolve issues with the FCC and state agencies regarding such conduct. As in this case, many potential violations of the Act are resolved by the FCC and state agencies. The resulting consent decrees generally provide, again as in this case, that the FCC or the state agency will not pursue further action against the company. If carriers believed that antitrust courts could nonetheless find them liable for the conduct that gave rise to such a decree, they would be far less willing to work with the agencies in resolving concerns or to admit to alleged violations in the decree—a result that would undermine a critical aspect of the regulatory enforcement regime.

In sum, if antitrust law were expanded to reach the conduct here, "[t]he elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes . . . ." *Goldwasser*, 222 F.3d at 401. As a result, "[e]nforcement under the Sherman Act [of violations of the 1996 Act] would effectively collapse enforcement of the Telecommunications Act, leaving only one effective means—the treble damages suit." *Cavalier*, No. 02-1337, Slip Op. at 21.

[23] *See Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963) (where regulatory agency had power to "investigate and bring to a halt" anticompetitive practices, "[i]f the courts were to intrude independently [into the regulatory arena of the Civil Aeronautics Act] with their construction of the antitrust laws, two regimes might collide").

II. The 1996 Act Creates a Regulatory Framework That Unambiguously and Comprehensively Addresses Potential Competitive Harm while Carefully Balancing Competing Policy Objectives.

The 1996 Act creates an exhaustive regulatory regime that is designed, among other things, to affirmatively facilitate telecommunications competition and stimulate facilities investment. To that end, the Act creates obligations that go far beyond what the antitrust laws require and establishes regulatory and enforcement mechanisms that render remote the possibility of any unaddressed, cognizable competitive harm.

To jump-start competition in telecommunications, the Act and the FCC's rules adopted under it impose an interlocking scheme of requirements on incumbent local carriers. One of the requirements is that incumbents unbundle their local telephone networks and offer building blocks of the network—so-called unbundled network elements—to their competitors at deeply discounted, regulated prices. The FCC's implementing rules expressly require incumbents to share facilities beyond any that could be considered "essential facilities," as that term has been used in antitrust law. And—as the facts of this case aptly demonstrate—the Act's unbundling requirements are backed up by a detailed and comprehensive state and federal enforcement regime that leaves little room for uncorrected abuse by incumbents.

In implementing and enforcing these new affirmative duties, the FCC strives to balance the competing objectives that Congress sought to achieve in the 1996 Act, such as facilitating new entry while stimulating investment in facilities by both incumbents and new entrants. The task of continuously refining the rules to accommodate changes in the industry has consumed the FCC for over seven years and continues today.

A. The Act Requires Incumbents To Share Their Facilities with Competitors at Regulated, Deeply Discounted Prices.

As the D.C. Circuit observed in *USTA*, "Congress sought to foster competition in the telephone industry, and plainly believed that merely removing affirmative legal obstructions would not do the job." 290 F.3d at 421-422. Instead, Congress moved to foster entry by requiring incumbent carriers to make their facilities and services available to new entrants at regulated prices. As this Court summarized in *Iowa Utilities Board*, an incumbent's duties in this respect are threefold: It must allow competitors to interconnect their facilities to its own; it must provide finished services to competitors for resale, at regulated discounts below retail prices; and it must offer unbundled network elements to competitors at regulated, cost-based prices. *Iowa Utils. Bd.*, 525 U.S. at 371 (citing 47 U.S.C. § 251(c)(2)-(4)); 47 U.S.C. § 252(d)(1). An incumbent also must allow competitors to collocate their facilities in its offices as needed to use the unbundled network elements it provides to them. 47 U.S.C. § 251(c)(6).[24/]

For the largest incumbents, the Bell Operating Companies ("BOCs"), these obligations are also a condition of entry into the long-distance markets in their service areas. *See* 47 U.S.C. § 271. Section 271 of the Act contains a fourteen-point checklist of sharing duties (which incorporate the section 251 duties) that BOCs must fulfill in order to obtain long-distance authorization. 47 U.S.C. § 271(c)(2)(B). Section 271 also includes a "public interest" standard, which the FCC has read to authorize further inquiry into competitive conditions in the local market and the

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[24/] The contours of this obligation have twice been the subject of judicial review. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000); *Verizon Telephone Cos. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002).

imposition of additional requirements.[25/] Thus, for example, the FCC has read section 271 to authorize it to require incumbents to commit to performance standards relating to their continued compliance with the checklist items, as a means of ensuring that local markets will remain open to competition after long-distance authority is granted. *Id.* at 20659, 20747 ¶¶ 217, 390.

Collectively, these obligations go far beyond a simple prohibition on the incumbent's obstructing competition or abusing market power: They commit incumbents to a whole new line of business they had not voluntarily chosen to enter—wholesaling to competitors at regulated prices. The affirmative obligation to become a supplier to one's competitors has no counterpart under section 2. Whatever validity or scope the "essential facilities" doctrine may have under the antitrust laws, the unbundling obligations under the FCC's rules are expressly broader. The FCC has declared that the unbundling obligations impose "broader dut[ies]" than would the essential facilities doctrine, because "Congress has already created an affirmative obligation for incumbent LECs to make their facilities available to competitors."[26/]

[25/] *See, e.g.*, Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543, 20747 ¶¶ 389-90 (1997) (by including the section 271(d)(3) public interest standard, Congress intended that the FCC look beyond the checklist and balance a number of factors in evaluating section 271 applications).

[26/] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3729 ¶ 60 (1999) ("UNE Remand Order"); *USTA*, 290 F.3d at 427 ("we do not intend to suggest that the Act requires use of . . . [the essential facilities] doctrine's criteria").

B. Congress Gave the FCC the Complex and Controversial Balancing Task of Determining the Particulars of the Regulatory Regime To Implement the Act's Sharing Obligations.

Congress entrusted to the FCC the task of determining the particulars of these new affirmative duties in a way that balances the competing objectives of the 1996 Act. With respect to the Act's unbundling obligations, the FCC must determine, first, which elements in the incumbents' networks must be unbundled. The Act requires the agency, in making this determination, to consider at a minimum whether "the failure to provide access to [particular] network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).[27/]

The FCC has the task of applying that standard in such a way as to strike precisely the right balance between too much and too little unbundling. In the FCC's initial *Local Competition Order*, the agency interpreted the "impair" standard to include *any* lack of access that would "decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."[28/] Applying that standard, the FCC ordered that virtually every part of an incumbent's network be unbundled, in order to stimulate prompt (though not facilities-based) entry by competitors.[29/]

[27/] For proprietary elements, the agency must consider whether access is "necessary" to enable new entrants to compete. 47 U.S.C. § 251(d)(2).

[28/] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15643 ¶ 285 (1996) ("Local Competition Order").

[29/] *Id.* at 15644 ¶ 287 (finding that a more limited approach to unbundling requirements "would inhibit new entry and thus restrict the

That initial effort was ultimately vacated on review in this Court as an overly broad interpretation of the statutory terms. As the Court found, "[s]ince any entrant will request the most efficient network element that the incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute an 'impairment' under [the FCC's] standard." *Iowa Utils. Bd.*, 525 U.S. at 389. The Court explained that the Act's "necessary and impair" standard is designed to impose a substantive constraint on the FCC's authority to designate network elements for unbundling and stressed that the agency was required to interpret the standard "taking into account the objectives of the Act." *Id.* at 388-89, 392.

On remand, the FCC sought to refine its interpretation of the "necessary and impair" standard to achieve "Congress' objective of promoting rapid competition to all consumers in the local telecommunications market," while following the "directives of the Supreme Court" and "build[ing] on industry experience and technological changes that have occurred in the telecommunications marketplace since the 1996 Act was enacted." *UNE Remand Order* at 3700, 3703-04 ¶¶ 4, 5, 14. The agency concluded that its unbundling determinations should reflect whether a lack of competitive access to network elements would "materially diminish[]" the ability of competitive carriers to offer services, taking into account the availability of alternative facilities and the cost, quality, and ubiquity of such alternatives, among other things. *Id.* at 3730-32 ¶¶ 62, 66. The FCC also recognized that it must consider other "objectives of the Act," including whether or not unbundling of an element would lead to rapid market entry by competitors, promote facilities-based competition and investment, reduce regulatory obligations, promote market certainty, and be administratively practical.

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potential for meaningful competition, which would undermine the procompetitive goals of the 1996 Act").

Id. at 3745-50 ¶¶ 101, 107-116. Under these standards, the agency reaffirmed its decision to require that almost all of the elements it had originally identified be unbundled, *id.* at 3919-20 ¶ 505, and, in subsequent orders, it adopted unbundling requirements for additional elements.[30/]

The FCC's unbundling determinations were again challenged, and the D.C. Circuit held that the balance between too much and too little unbundling had to be refined still further. *USTA*, 290 F.3d at 427-29. The court ruled that the FCC had not accounted for the fact that unbundling "comes at a cost, including disincentives to research and development by both ILECs [incumbent local exchange carriers] and CLECs [competitive local exchange carriers] and the tangled management inherent in shared use of a common resource." *Id.* at 429.[31/]

On remand, the FCC has recently adopted, though it has not yet released, an order amending many of the previously identified unbundling obligations.[32/] In fact, "[r]ecognizing that market conditions . . . change and create a need for commensurate changes to the unbundling rules," the FCC reviews the unbundling requirements on a triennial basis.[33/]

The effort to define an appropriate regulatory balance further requires that regulators accurately set the prices (as well as other terms and conditions) at which incumbents

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[30/] *See, e.g.*, Fourth Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) ("Line Sharing Order").

[31/] Although courts have overturned parts of the FCC's rules on several occasions, the rules have remained in effect in some version since 1996.

[32/] *See* Public Notice, FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers, CC Docket No. 01-338 (Feb. 20, 2003).

[33/] Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of the Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781, 22782-83 ¶ 1 (2001).

offer the elements they are required to unbundle. The practical impact of the unbundling regime obviously depends heavily on the prices at which network elements are made available. The lower the prices, the more a broad unbundling obligation may discourage investment and efficient facilities-based entry; the higher the prices, the less the unbundling obligation may promote resale-based competition. "[L]ow [network element] prices would not only have the direct effect [of diminishing incentives to invest] but would inherently tend to expand the sphere of these effects." *USTA*, 290 F.3d at 425 n.2. Implementation of the unbundling requirements thus inherently involves decisions not just about what to unbundle, but at what prices.

The Act provides that the prices at which unbundled network elements are offered must be based on the incumbent's costs (including a reasonable profit) of providing the network elements, determined in a manner other than the rate-of-return regulation that prevailed in the traditional monopoly environment. 47 U.S.C. § 252(d)(1)(A)(i). Congress authorized the FCC to prescribe a specific pricing methodology. 47 U.S.C. § 252(d)(1); *see also Iowa Utils. Bd.*, 525 U.S. at 385. The FCC's methodology, which is known as TELRIC,[34] is an attempt to replicate the prices that would prevail in a perfectly competitive marketplace by hypothesizing the forward-looking costs of a most-efficient network that incorporates the best available technology. *Local Competition Order* at 15848-49 ¶ 685. This Court recently upheld the TELRIC methodology, although it found that the agency could reasonably have interpreted section 252 of the Act to allow any number of other costing approaches.[35] Many industry

[34] "TELRIC" stands for "total element long-run incremental cost." *Local Competition Order* at 15844-73 ¶¶ 674-740; *see also* 47 C.F.R. §§ 51.501-51.513.

[35] *Verizon*, 535 U.S. at 500 ("[T]he word 'cost' in § 252(d)(1), as in accounting generally, is a 'chameleon' . . . a 'virtually meaningless' term. [W]ords like 'cost' 'give ratesetting commissions broad methodological leeway; they say little about the method employed to determine a particular rate.'") (quotations omitted).

participants have urged the FCC to reconsider and revise its TELRIC methodology, arguing that a new approach that more closely compensates the incumbents for their actual costs would better serve the 1996 Act's goal of encouraging efficient, facilities-based competition.[36] The agency has indicated that it is open to reexamining its TELRIC rules.[37]

C. The 1996 Act Creates Processes for *Ex Ante* Application of the Sharing Requirements to the Relationships Between Particular Interconnecting Carriers.

The sharing requirements elaborated in the FCC's rules are further implemented through a detailed, statutorily prescribed scheme in which that agency, the states, and the courts each play assigned roles. Rather than rely chiefly on *ex post* enforcement to ensure that incumbents comply with the Act's requirements, Congress instead gave competing carriers a right to trigger, and incumbents an affirmative duty to participate in, a process of negotiation backed by arbitration to define explicitly every specific unbundling commitment the incumbent must make to a particular competitor. That multi-layered process enables carriers to

[36] *See* Letter from Glenn T. Reynolds, Vice President, BellSouth Corporation, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-98 (filed April 28, 2003); Letter from William Daley, President, SBC Communications Inc., to Michael Powell, Chairman, FCC, CC Docket No. 01-338 (filed Sept. 6, 2002); Letter from William P. Barr, Executive Vice President and General Counsel, Verizon Communications, to Michael Powell, Chairman, FCC, CC Docket No. 01-338 (filed July 18, 2002).

[37] *See Local Competition Order* at 15813 ¶ 620 (the FCC will "issue additional guidance" on TELRIC "[i]n the aftermath of the arbitrations and relying on the state experience" in using TELRIC to set actual rates).

have all of their competitive concerns addressed promptly, substantially eliminates the possibility that incumbents can engage in undetected or prolonged noncompliance, and allows for constant recalibration of the contours of the applicable requirements to meet changed circumstances.

New entrants are entitled to secure their rights under the Act and the FCC's rules through written interconnection agreements that they negotiate with incumbents. A competitor who wishes to lease network elements from the incumbent has an explicit statutory right to demand that the incumbent negotiate in good faith to reach an agreement. 47 U.S.C. § 251(c)(1). If the parties reach an agreement, the agreement is subject to approval by a state regulatory commission, which can reject it only if it is discriminatory or inconsistent with the public interest. *Id.* § 252(e)(2)(A). If the parties fail to reach a negotiated agreement, either party may demand arbitration of disputed issues by the state commission, which is empowered to impose a binding interconnection agreement on the parties. *Id.* § 252(b)(1).[38] The state commission must resolve the arbitrated issues within nine months from the date the incumbent received the request for negotiation. *Id.* § 252(b)(4)(C). In resolving the issues, the state commission must apply the FCC's unbundling rules and must fix rates that result from the application of the FCC's TELRIC pricing methodology in the particular instance. *See Iowa Utils. Bd.*, 525 U.S. at 384.

State arbitration proceedings (and related proceedings to implement the 1996 Act) are exhaustive and highly technical and typically require consideration of competing cost models

[38] In the event that a state commission fails to carry out its responsibilities, Congress authorized the FCC to act in the state commission's place, 47 U.S.C. § 252(e)(5); this has occurred rarely. *See* Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277 (2000).

as well as voluminous testimony by economic and engineering experts, among others. The state commissions must resolve an extraordinarily detailed list of prices, terms, and conditions for the facilities and services that incumbents must offer in order to meet their obligations under the 1996 Act. For example, the New York Public Service Commission ("PSC") in its most recent arbitration set nine different monthly rates for a network interface device, a small plastic box containing wires that connect a customer's line to distribution plant facilities through a splitter, ranging from $1.09 to $7.35, depending on the type of loop technology and density of the customer's area—and this was just one of many facilities at issue in that case.[39] Similarly, an arbitrating state commission must determine how many minutes are required for (and therefore how much labor cost should be assigned to) each of the numerous tasks necessary to process and provision an order for each element, including, for example, the time needed to drain a manhole of excess water so that a worker can make needed changes to a loop facility. State commissions must also address every relevant non-cost issue the parties have raised. These range from the minutiae of whether the effective date for a new billing rate when a CLEC converts special access service to an enhanced extended link should be the first day of the following month or fifteen days after the order is placed, to the regulatory esoterica of whether a service known as virtual foreign exchange should be classified as local or long distance and what intercarrier compensation regime should apply to such traffic.

Negotiated or arbitrated agreements typically are revised every three-to-four years. The agreements are public, and any competitor may request the same terms that an

[39] *See* Verizon Telephone Operating Companies Effective Tariffs, State of New York, PSC NY NO. 10 (916) Network Elements, *available at* https://retailgateway.bdi.gte.com:1490/cyberdocs.asp?optState=NY.

incumbent has provided to another competitor. 47 U.S.C. § 252(i). In the interconnection agreement or as a condition of section 271 long-distance authority, the state commissions frequently require the incumbent to commit to a detailed "performance assurance plan," obligating the incumbent to offer high quality and timely service to its competitor and imposing penalties for failure to do so. Under these plans and other state regulations, incumbents must report their performance with respect to processing and provisioning CLEC orders to regulators and the CLECs based on numerous different metrics on a monthly basis. Verizon's New York plan has hundreds of metrics, including the average response time, measured to the nearest hundredth of a second, for Verizon's systems to validate electronically the customer address a CLEC submits with its order and the percentage of ordered facilities out of service for four hours, twelve hours, and twenty-four hours.[40/]

As a final measure to ensure proper and thorough implementation of the Act's requirements, Congress dictated that disputes concerning whether the state has properly complied with the Act and the FCC's rules may be brought before the federal district courts. *Id.* § 252(e)(6).[41/] Those courts decide de novo all questions of federal law raised in the challenge, including interpretation of the Act and the FCC's rules.[42/]

[40/] *See* Verizon Performance Assurance Plan, NY PSC Case No. 99-C-0949, *available at* http://www.dps.state.ny.us/Case_99C0949.htm; New York Carrier-to-Carrier Guidelines Performance Standards and Reports, NY PSC Case No. 97-C-0139 (Nov. 2002), *available at* http://www.dps.state.ny.us/ny_c2c_guidelines_11_2002.pdf.

[41/] *See also Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002) (state commissions are not immune under the Eleventh Amendment to challenges of determinations under section 252 of the Act).

[42/] *See, e.g., Pac. Bell v. Pac-West Telecomms, Inc.*, 325 F.3d 1114, 1123 n.8 (9th Cir. 2003).

D. The Regulatory Regime Includes Explicit and Readily Available *Ex Post* Enforcement Mechanisms.

The Act and the FCC's rules provide enforcement mechanisms that facilitate detection, investigation, and remediation of any violations of the incumbents' sharing duties. Both the FCC and state commissions have specific enforcement authority and have used it actively. This, like the extensive reach of the obligations themselves, reduces the risk of significant or ongoing anticompetitive conduct. And because competitors have every incentive to bring violations to the regulators' attention, there is little chance that misconduct will go undetected.

First, state regulatory commissions have the power to interpret and enforce incumbents' interconnection agreements.[43/] As the courts have recognized, state commissions thus act as "'deputized federal regulator[s]' authorized to exercise regulatory power and ensure compliance with federal law as set out in the [Act]."[44/] The states have actively assumed this role. For example, a state commission recently fined an incumbent carrier $26 million and required it to offer its competitors a ten percent rebate for wholesale services the competitors bought in the last eighteen months, as a sanction for preferential treatment of

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[43/] *See BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1274-76 (11th Cir. 2003) (en banc); *Bell Atlantic-Maryland., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304 (4th Cir. 2001), *vacated on other grounds sub nom. Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002); *Southwestern Bell Telephone Co. v. Brooks Fiber Comunications of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Telephone Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000); *Illinois Bell Telephone Co. v. WorldCom Techs, Inc.*, 179 F.3d 566, 573 (7th Cir. 1999).

[44/] *BellSouth Telecomm., Inc.*, 317 F.3d at 1277-78 (quoting *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000)).

competitors in violation of sections 251 and 252 of the Act.[45] Other carriers likewise have incurred multimillion-dollar penalties for failure to comply with the performance standards adopted by the states under those sections.[46]

Section 271 gives the states additional authority to police the Act's sharing requirements. As noted, many states require a BOC to enter into a performance assurance plan as a predicate for the state's recommendation that the FCC approve the BOC's request for section 271 long-distance authority. These plans typically establish specific performance standards, schedules of penalties for violations, and auditing and accounting procedures, with state commission review of the BOC's performance every six months and a more comprehensive review every three-four years. They provide added assurance that the BOC will continue to satisfy the conditions of long-distance approval—which, as noted, incorporate the section 251 sharing requirements—after entering the long-distance market.[47]

The FCC has its own enforcement powers. Under

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[45] Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, *Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 at 3, 7 (Minn. Pub. Utils. Comm'n, Nov. 1, 2002).

[46] *See, e.g.*, Order, *Performance Measurements for Telecommunications Interconnection, Unbundling and Resale*, Docket No. 7892-U (Ga. Pub. Serv. Comm'n, Jan. 16, 2001) (fining BellSouth $3.5 million for failing to meet performance standards established by the Georgia commission).

[47] *See, e.g.*, Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11, FCC 03-81, ¶ 119 (rel. Apr. 15, 2003); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc. et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17487-90 ¶¶ 127-32 (2001).

section 208 of the Communications Act, any person injured by a carrier's violation of any requirement of that statute (as amended by the 1996 Act) or any FCC rule may file a formal complaint with the FCC, which must investigate the complaint and in many cases must resolve it within a specific time. 47 U.S.C. § 208. In adjudicating such complaints, the FCC has the power to award damages, as well as to take other "necessary" enforcement measures. *Id.* §§ 154(i), 206, 209. The FCC has concluded that its section 208 "enforcement authority . . . extends to the local competition provisions of the 1996 Act."[48] Indeed, the agency has specifically ruled that its section 208 authority extends to complaints asserting violations of the sharing requirements of sections 251 and 252[49] or of an interconnection agreement.[50] In the FCC's view, such centralized enforcement of the sharing obligations "enhances enforcement, and competition, by resolving the issues economically, helping to achieve uniform results, and relieving the parties of the burdens of multistate litigation." *Core Communications*, EB-01-MD-017, FCC 03-83 at ¶ 18.

The FCC has additional enforcement powers with respect to incumbents that have received long-distance

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[48] Memorandum Opinion and Order, *Core Communications, Inc. v. SBC Communications, Inc.*, EB-01-MD-017, FCC 03-83, ¶ 17 (rel. Apr. 17, 2003).

[49] *See Local Competition Order* at 15564 ¶ 126 ("Sections 251 and 252 do not divest the Commission of its section 208 authority."); *Core Communications*, EB-01-MD-017, FCC 03-83 at ¶ 14 (the Act "expressly grants the Commission jurisdiction to resolve complaints alleging any violation of the Act"); Memorandum Opinion and Order, *TSR Wireless, LLC v. U S West Communications, Inc.*, 15 FCC Rcd 11166, 11172 ¶ 13 (2000) (Commission has authority to resolve section 208 complaints alleging, *inter alia*, violations of sections 251 and 252), *aff'd on other grounds, Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[50] Memorandum Opinion and Order, *Core Communications, Inc. v. Verizon Maryland, Inc.*, File No. EB-01-MD-007, FCC 03-96 (rel. Apr. 23, 2003).

authority under section 271. If at any time such an incumbent "cease[s] to meet any of the conditions required" for approval, the FCC may order the carrier to correct the deficiency, impose a penalty, or revoke or suspend authority to offer long-distance services in that state. 47 U.S.C. § 271(d)(6). The FCC has made clear that it intends to hold incumbents to a high standard of compliance with the conditions on which section 271 authority is granted.[51] The FCC also uses its enforcement authority to conduct regular audits of BOCs' compliance with section 271.[52]

Finally, the FCC has general authority to investigate violations of the Act or its rules on its own initiative and to issue findings and penalties or seek injunctive relief. 47 U.S.C. § 403. The FCC has repeatedly used this power to investigate violations of the Act. It has recently entered into a number of consent decrees with incumbents requiring substantial payments and corrective actions in connection with alleged violations of sections 251 and 271 of the Act.[53]

The Act thus gives both state commissions and the FCC a broad arsenal of enforcement weapons from which to choose. Because competitors and others have strong incentives to invoke these authorities if incumbents fail to meet their obligations, this enforcement regime makes

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[51] *See* Memorandum Opinion and Order, *WorldCom, Inc. v. Verizon New England Inc.*, 17 FCC Rcd 15115, 15128 ¶ 26 (2002) ("WorldCom Order").

[52] *See, e.g.*, *New York 271 Order* at 4174-77, ¶¶ 446-453 (describing the FCC's monitoring of post-entry compliance); *see also* FCC, "Section 271 Enforcement," *available at* http://www.fcc.gov/eb/LoTelComp/-271.html (describing the FCC's 271 Compliance Review Program).

[53] *See, e.g.*, Order, *Qwest Communications International, Inc.*, EB-02-IH-0674, FCC 03-107 (rel. May 7, 2003) ($6.5 million); Order, *Verizon Telephone Companies*, 18 FCC Rcd 3492 (2003) ($5.7 million); Order, *SBC Communications, Inc.*, 17 FCC Rcd 10780 (2002) ($3.6 million).

unlikely any continued, unremedied denials of required access.

E. The Regulatory Regime Thoroughly and Successfully Addressed the Underlying Dispute in This Case, Demonstrating That Antitrust Law Need Not Be Extended To Encompass the Conduct Here.

Both the FCC and the New York PSC investigated the conduct at issue in this case and imposed monetary penalties and future performance requirements on Bell Atlantic to ensure its future compliance with its regulatory obligations. In contrast with cases such as *Otter Tail*, in which courts have permitted antitrust actions where a regulatory agency did not or could not address the alleged competitive harm under the regulatory regime,[54] here the federal and state agencies have addressed and fully remedied the conduct that the respondents allege violated the antitrust laws. Thus, the facts of this case highlight the inappropriateness of recognizing new sharing duties of incumbent carriers under the Sherman Act.

The FCC's Enforcement Bureau began in February 2000 to investigate possible lapses in the operation of Bell Atlantic New York's computerized operating support systems ("OSS") that allegedly resulted in lost or mishandled communications regarding AT&T orders for unbundled elements. Because Bell Atlantic had already received section 271 authority for New York, the FCC proceeded under section 271(d)(6).[55] The investigation promptly led to a consent decree between the FCC and Bell Atlantic in March 2000.[56] Under that decree, Bell Atlantic paid $3

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[54] *See Otter Tail*, 410 U.S. at 375 ("[s]o far as [the alleged antitrust harm] is concerned, there is no authority granted the Commission under Part II of the of the Federal Power Act to order it").

[55] *See* Part II.D *supra* (discussing § 271(d)(6)).

[56] Order, *Bell Atlantic-New York Authorization Under Section 271*

million to the U.S. Treasury and "implemented hardware and software changes, and instituted revised manual and electronic procedures, designed to improve performance in processing orders and timely sending required status notifiers." *See Consent Decree* at 5418-21 ¶¶ 8, 15, 16. The decree required Bell Atlantic to submit weekly performance reports to enable the agency to monitor Bell Atlantic's future OSS performance and prescribed a detailed schedule of additional payments if the carrier did not maintain specified performance levels.[57]

The consent decree stated that it was "a final settlement between BA-NY and the Commission" of the underlying investigation and that the FCC would not use the facts developed in the investigation for any further investigations or proceedings against Bell Atlantic. *Consent Decree* at 5420-21 ¶¶ 13, 17. On June 20, 2000, the FCC announced that Bell Atlantic had satisfied the requirements of the consent decree and that it was no longer required to report its OSS performance to the agency.[58] FCC Chairman Powell has characterized the agency's response to the conduct at issue in this case as "swift and substantial."[59]

The same conduct was also subject to enforcement

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of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd 5413 (2000) ("Consent Decree").

[57] Measured against specific weekly performance metrics prescribed in the consent decree, Bell Atlantic agreed to make additional payments of $4 million if its aggregate performance fell below 90% for two consecutive weeks, $8 million if its aggregate performance fell below 90% for a third consecutive week, and $12 million if its aggregate performance fell below 90% for a fourth consecutive week. *See Consent Decree* at 5420-21 ¶15.

[58] *See* Press Release, FCC, Enforcement Bureau Announces that Bell Atlantic Has Satisfied Consent Decree Regarding Electronic Ordering Systems in New York (June 20, 2000).

[59] *See WorldCom Order* at 15130-31 (separate statement of chairman Michael K. Powell).

action at the state level. The New York PSC adopted the FCC's OSS performance requirements and imposed *additional* monetary penalties and reporting requirements on Bell Atlantic. In two orders issued in February and March 2000, the state agency described its own investigation of Bell Atlantic's OSS lapses and the subsequent arrangements it had made with Bell Atlantic to resolve the problems.[60] Beginning in February 2000, the New York PSC required Bell Atlantic to submit *daily reports* demonstrating its OSS performance. *See NY PSC Feb. 2000 Order* at 4. When Bell Atlantic failed to resolve its OSS difficulties completely by March 2000, it agreed to provide its competitors $10 million in credits to bills for April 2000. This payment supplemented credits Bell Atlantic was already required to give to competitors under its New York performance assurance plan on account of the lapses. Bell Atlantic also agreed to amend that plan to incorporate the FCC's new OSS performance metrics.

The New York PSC released Bell Atlantic from its daily and weekly reporting requirements in July 2000, finding that the reports showed steady improvement in Bell Atlantic's OSS performance.[61] However, the agency stated that "[s]taff

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[60] Order Directing Improvements to Wholesale Service Performance, *Complaint of MCI WorldCom, Inc against Bell Atlantic-New York concerning Billing Completion Notices, Firm Order Commitments, Acknowledgements and Tracking Numbers*, filed in C 99-C-1529, et al., Case 00-C-0008, et al. (N.Y. Pub. Serv. Comm'n, February 11, 2000) ("NY PSC Feb. 2000 Order"); Order Directing Market Adjustments and Amending Performance Assurance Plan, *Complaint of MCI WorldCom, Inc against Bell Atlantic-New York concerning Billing Completion Notices, Firm Order Commitments, Acknowledgements and Tracking Numbers*, filed in C 99-C-1529, et al., Case 00-C-0008, et al. (N.Y. Pub. Serv. Comm'n, March 23, 2000).

[61] *See* Order Addressing OSS Issues, Complaint of MCI WorldCom, Inc against Bell Atlantic-New York concerning Billing Completion Notices, Firm Order Commitments, Acknowledgements and Tracking Numbers, filed in C 99-C-1529, et al., Case 00-C-0008, et al., at 2 (N.Y.

will continue to follow up on issues related to the OSS to ensure that the order provisioning process continues to improve," and it required Bell Atlantic to provide AT&T with an additional $100,000 in bill credits. *Id.* at 6.

The enforcement actions taken by both the FCC and the NY PSC in this case demonstrate why extension of antitrust law to cover the conduct alleged in this case would be unjustified and would interfere with the regulatory regime. The remedies for Bell Atlantic's shortcomings were extensive and interrelated, including substantial penalties to deter future violations, payments to competitors, and detailed prospective compliance provisions. The agencies acted expeditiously to remedy any competitive harm—the FCC's consent decree was entered the month after the agency began an investigation, speed that an antitrust court could not hope to match. The prospective remedies involved the type of extensive, ongoing monitoring by regulators in which courts could not reasonably engage. The enforcement actions also required close coordination between the FCC and the NY PSC to ensure that the ordered remedies were complementary and consistent.[62/] It could not be clearer that injecting antitrust courts into this enforcement process—and into the implementation and enforcement of the hundreds of other detailed obligations that make up the statutory sharing regime—simply is not justified and would impede the activities of the expert agencies to which Congress entrusted implementation and enforcement of that regime.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

Pub. Serv. Comm'n, July 27, 2000).

[62/] *See Consent Decree* at 5413-14 ¶ 5 ("We have worked closely with the New York PSC on this matter and intend to continue to work closely with it on Bell Atlantic-related section 271 enforcement issues.").

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No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, L.L.P.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF BELLSOUTH CORPORATION, SBC COMMUNICATIONS INC., AND QWEST COMMUNICATIONS INTERNATIONAL INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici will address (1) whether allegations of deficiencies in an incumbent telecommunications carrier's assistance to competing carriers state a claim under the antitrust laws, and (2) whether antitrust litigation over routine performance disputes between carriers would conflict with and undermine the remedial framework of the Telecommunications Act of 1996.

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INTEREST OF THE AMICI CURIAE

Amici BellSouth Corporation, SBC Communications Inc., and Qwest Communications International Inc. are incumbent local exchange carriers ("ILECs") in their respective regions. Amici have entered into thousands of interconnection and resale agreements with competing local exchange carriers ("CLECs") pursuant to the Telecommunications Act of 1996 ("1996 Act").

Because the parties to these agreements are competitors, disputes frequently arise between them over a host of technical details—ranging from the terms of equipment collocation to the price, quality, and speed of unbundling network elements and processing customer orders. Most of these disputes are resolved informally or, where necessary, before the state commissions that oversee relations between local telecommunications carriers. Emboldened by the decision below and lured by the prospect of treble damages, CLECs and consumers have filed numerous antitrust suits over the same issues. Amici agree with petitioner that the scope of the antitrust laws should not be expanded to encompass carrier performance issues and that antitrust adjudication of such issues is incompatible with the remedial framework prescribed by Congress in the 1996 Act.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

By ignoring established limits on the reach of the antitrust laws, the Second Circuit has opened the door to

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[1] This brief was not written in whole or in part by any party and no one other than the amici made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the clerk.

unprecedented and burdensome antitrust litigation in the federal courts. This Court's precedents bar antitrust claims based on routine performance disputes between contracting parties and recognize that even monopolists have no antitrust duty to assist their competitors except in narrow circumstances not present here. Where, as here, the performance disputes are grounded in duties imposed by regulatory laws, and a federal statute clearly assigns responsibility to expert agencies to define, adjust, and remedy violations of new duties specially crafted for a single industry, there is even less occasion for the involvement of antitrust courts in these disputes.

Respondent's allegation that Verizon sometimes failed to process orders of AT&T and other CLECs "in a timely manner" (Am. Cmplt. ¶ 21) does not support an antitrust claim. The antitrust laws do not require Verizon to assist its rivals and are not concerned with such run-of-the-mill performance disputes. As the Seventh Circuit held in *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the antitrust laws may not be invoked to generate a supplementary, common-law body of network sharing obligations and affirmative assistance to rivals. Accord *Cavalier Telephone LLC* v. *Verizon Virginia, Inc.*, No. 02-1337, slip op. at 18 (4th Cir. May 20, 2003). The regulatory issues raised by respondent fit precisely into the remedial framework created by Congress in the 1996 Act.

The unprecedented regulatory regime created by Congress in the 1996 Act requires an incumbent carrier to share its network and facilities with competitors to help them enter and gain market share in the local telephone business, affirmative assistance not required by the antitrust laws. The sharing obligations prescribed by the Act would be unthinkable as antitrust duties imposed generally on American industry. To implement these new

extraordinary duties, the Act prescribes an elaborate system of compulsory negotiation and arbitration, with full enforcement by state and federal administrators. That remedial framework cannot be reconciled with the holding of the court below that alleged shortfalls in performing these new duties—even if already addressed pursuant to the administrative scheme of the 1996 Act—may give rise to lawsuits under the antitrust laws.

The district court properly recognized that respondent's allegations failed to state an antitrust claim. In contrast, the Second Circuit has radically extended the scope of federal antitrust litigation by broadly sanctioning monopolization suits under the "essential facilities" doctrine, by adopting an unwarranted extension of this Court's narrow "duty to deal" decisions, and by reviving a discredited version of the monopoly leveraging doctrine. Nothing in the 1996 Act suggests that Congress ever intended to have the Act's novel and far-reaching duties serve as the predicate for antitrust liability. To the contrary, Congress expressly provided that the Act's newly articulated administrative standards would not "modify" or otherwise extend the federal antitrust laws. See *infra* pp. 28-29.

Within the 1996 Act's comprehensive framework, carriers have negotiated thousands of interconnection agreements specifying their rights and obligations, many of which require alternative dispute resolution and specify sanctions for breach. The decision below renders all this for naught. Any dissatisfied CLEC or consumer may take performance disputes to court and demand treble damages, even if the directly affected carriers have resolved their differences to their complete satisfaction, as AT&T and Verizon did here. The practical result is that lay juries will be invited to second-guess expert agencies over complex regulatory policy issues, generating conflicting standards

and imposing duplicative damage awards for violations already remedied (as here, by a $10 million award to AT&T and other CLECs and a $3 million award to the government).

These questions were correctly resolved by the Seventh Circuit in *Goldwasser*, 222 F.3d at 395, an analogous case in which telephone consumers alleged "undue delays" by an ILEC in providing network access to its competitors. The *Goldwasser* opinion, authored by Judge Diane Wood, an antitrust scholar and former antitrust enforcement official at the Department of Justice, sensibly evaluates the intersection between antitrust and telecommunications law: the "affirmative duties to help one's competitors" imposed by the 1996 Act "do not exist under the unadorned antitrust laws." 222 F.3d at 399-400. And the Fourth Circuit recently reached the identical conclusion, noting that "if a company such as Verizon * * * were asked to share its office space and to rent its telephone lines and other facilities to a competitor when it was not already in the business of renting office space, lines, or facilities, it could have legally refused the request to expand into such a business without violating § 2 of the Sherman Act." *Cavalier*, slip op. at 18.

To "equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws," would be illogical. *Goldwasser*, 222 F.3d at 400. Moreover, Congress "entrusted supervision" of interconnection duties to expert regulatory agencies and "created a system of negotiated agreements through which this would be accomplished." *Id.* at 399-400. As a practical matter, the court explained, the 1996 Act's procedures are not "compatible" with antitrust resolution of performance claims: "The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be

brushed aside by any unsatisfied party with the simple act of filing an antitrust action," and "[c]ourt orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the § 252 agreements." *Id.* at 400-401.

The principles articulated by Judge Wood apply directly here. As the Solicitor General stated in his brief supporting the petition (at 8), "[t]he Second Circuit's decision is erroneous" because it "dramatically expands antitrust liability for failure to assist rivals." Dissenting from a similarly erroneous decision by the Eleventh Circuit, Judges Tjoflat, Anderson, and Birch explained that permitting such "forced-access" under the antitrust laws represents "bad policy [and] undermines Congress's regulatory scheme." *Covad Communications Co.* v. *BellSouth Corp.*, 314 F.3d 1282, 1286 (11th Cir. 2002). This Court should adopt the views of the Seventh Circuit, the Fourth Circuit, the Solicitor General, and the dissenting judges in *Covad* and reverse the decision below.

ARGUMENT

I. THE COURT BELOW DISREGARDED ESTABLISHED LIMITS ON THE SCOPE OF THE ANTITRUST LAWS.

The Second Circuit erred as a matter of law when it reinstated respondent's Section 2 claim. Respondent alleged no more than a breach of performance duties set forth in the interconnection agreement executed by Verizon and AT&T pursuant to the 1996 Act. The antitrust laws generally do not require firms to assist rivals at all, much less impose performance standards on such assistance. The court speculated that respondent *might* be able to show that Verizon's conduct amounted to an unlawful refusal to deal (under the so-called "essential

facilities" doctrine) or unlawful monopoly leveraging. Neither theory was articulated in respondent's complaint, and neither theory, even if valid, would apply to the provisioning issues raised by respondent.

A. Antitrust Law Does Not Govern Routine Performance Disputes Between Contracting Competitors.

Respondent's allegations that Verizon failed to fill CLEC orders "in a timely manner" and failed "to inform CLECs of the status of their customers' orders" (Am. Cmplt. ¶21) do not state a claim for unlawful monopolization but at most suggest a breach of contract. Verizon had no *antitrust* duty to meet AT&T's preferred timetable.

An ILEC's obligations to process CLEC orders derive solely from its interconnection agreements (and ILECs enter into those agreements solely because the 1996 Act mandates that they do so). Verizon's interconnection agreement with respondent's carrier, AT&T, was replete with performance standards and penalties and specified ADR procedures as the "exclusive remedy" for any complaints about contractual performance. Pet. App. 5a. Purchasers commonly demand faster and better service, but "[i]t is not an antitrust purpose to regulate ordinary business contracts." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶782m, at 282 (2d ed. 2002) (citing cases). Allowing such contract disputes to be bootstrapped into antitrust claims would overwhelm the courts and inflict a pointless waste of private and judicial resources. As Judge Tjoflat warned, "I cannot think of a situation [in] which an ILEC would be liable in breach and yet a creative plaintiff's lawyer could not also allege that the breach was made with an eye toward * * * preserving the

ILEC's position in the relevant market." *Covad*, 314 F.3d at 1290 n.17.

Even if there were something "unfair" about Verizon's alleged treatment of CLEC orders (see Am. Cmplt. ¶21), "business behavior that is improper for various reasons" is not the proper focus of "treble-damages antitrust cases." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 137 (1998). The Sherman Act "does not purport to afford remedies for all torts." *Hunt* v. *Crumboch*, 325 U.S. 821, 825-826 (1945) (affirming dismissal of antitrust suit). Antitrust law does not police "unfair competition." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993). Conduct that is "punishable under more common state remedies, including contract and tort remedies[,] does not require the powerful prohibition of the antitrust laws." *Southern Pines Chrysler-Plymouth* v. *Chrysler Corp.*, 826 F.2d 1360, 1363 (4th Cir. 1987). In short, allegations of garden-variety deficiencies in performance of interconnection agreement duties do not state an antitrust claim.

B. An ILEC's Failure To Give Costly Affirmative Assistance To Rivals In The Manner They Prefer Is Not A "Refusal To Deal."

As this Court has recognized, the general rule under antitrust law is that firms, including purported monopolists, have no duty to cooperate or share their resources with competitors. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985); see 3A Areeda & Hovenkamp, ANTITRUST LAW ¶773a, at 196 (there is no "general duty to share one's resources"). Antitrust law encourages firms to compete against, not assist, competitors. The rationale is that vigorous competition, not compelled sharing of resources, yields output and prices that optimally benefit consumers. See

Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984). Thus, even a monopolist has "no duty to extend a helping hand to new entrants." *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.).

An ILEC's affirmative duties to share its resources with rivals derive not from antitrust law but from the 1996 Act and the interconnection agreements it mandates. The Act requires ILECs to provide rivals with access to their network elements and services on uniquely favorable terms. 47 U.S.C. § 251(c)(2) and (3). These "special duties" designed to "jump-start the development of competitive local markets" "go well beyond anything the antitrust laws would mandate on their own." *Goldwasser*, 222 F.3d at 399-400; see also H.R. Conf. Rep. No. 104-458, at 123 (1996) ("Conf. Rep.") (these "new obligations flow only from the statute"). The court below improperly conflated the jump-starting duties imposed by the 1996 Act with antitrust duties. See *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485 (1932) (affirming dismissal of antitrust claims that alleged "violations of [statutory] provisions or are so interrelated with such charges as to be in effect a component part of them").

This Court has recognized a narrow "refusal to deal" exception to the general antitrust rule against forced cooperation. *Aspen Skiing*, 472 U.S. at 603. But this Court has never employed the "refusal to deal" rationale to require a defendant to act irrationally, that is, to sacrifice its own business interests in order to aid a rival. A monopolist's refusal to deal may be unlawful under the antitrust laws only if it is "predatory," *i.e.*, not based on "efficiency," and has no purpose other than harm to competition. *Aspen Skiing*, 472 U.S. at 602-603.

In *Aspen Skiing*, 472 U.S. at 608, the defendant "elected to forgo * * * short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." Similarly, in *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 148 (1951), the defendant newspaper refused to accept fully-paid advertisements from companies that submitted ads to a rival, thereby sacrificing its short-term economic interest in maximizing its advertising revenues. The defendant in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 378 (1973), refused to transmit power to the requesting cities on the same profitable terms on which it regularly transmitted such power to others "solely to prevent" competitors from gaining market share. See also *Otter Tail*, 331 F. Supp. 54, 57 (D. Minn. 1971) (Otter Tail "regularly engages in the business of wheeling power"), aff'd in relevant part, 410 U.S. 366 (1973). In each of these cases, the refusal to sell a facility or service to a competitor that the defendant was profitably selling to others raised a presumption of predatory conduct. That presumption was heightened where the defendant long had provided the item that it later refused to provide, as in *Aspen Skiing*, 472 U.S. at 603, and *Lorain Journal*, 342 U.S. at 146-148.

Verizon's alleged failure to provide the speed and quality of access demanded by AT&T and other CLECS cannot be deemed irrational. The 1996 Act, as implemented by the FCC, requires ILECs "to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467, 489 (2002). ILECs must "share their own facilities" with competitors and supply them with packages of elements and services at a price lower than the ILEC would obtain if it sold that package directly to a retail

customer. *Id.* at 476. No rational business would ever supply vital elements and services to competitors at near-confiscatory rates. It would be irrational—indeed, commercially suicidal—for a firm charging a retail customer $100 a month to provide subsidized inputs that enable rivals to offer that customer the same service at $60 a month.

While the 1996 Act requires such business practices (within regulatory limits), antitrust law does not. See *Verizon Communications*, 535 U.S. at 528 (competitor access to network facilities was "something brand new under the 1996 Act"); *United States* v. *AT&T*, 604 F. Supp. 316, 324 (D.D.C. 1985) (AT&T divestiture decree did not seek "artificial creation of competition by enabling [rival] interexchange carriers to share AT&T's interexchange capabilities and facilities"). Until now, no antitrust court ever has required a firm to give up profitable retail sales in order to make less profitable (much less near-confiscatory) sales to rivals. In *Aspen Skiing*, for example, this Court did not require the defendant to provide access to its ski mountain *at a discount* so that the plaintiff could undercut the defendant's prices and divert its customers. And the decree in *Otter Tail* required the defendant to transmit power at the same "compensatory" rates that were voluntarily offered to others. See 410 U.S. at 375.

Respondent has not alleged—nor *can* it allege—how it would make economic sense for Verizon to assist rivals in taking away Verizon's customers. Thus, even if the complaint had alleged an actual refusal to deal, and not merely deficiencies in performance, it would not state a monopolization claim.

Respondent has not alleged an actual refusal to deal within the scope of the Court's decisions. In *Aspen Skiing*, 472 U.S. at 610, the defendant absolutely refused to

continue its profitable joint marketing venture with the plaintiff. Similarly, the unlawful conduct in *Lorain Journal*, 342 U.S. at 150, was an attempt to completely exclude a radio station from access to vital advertising and thereby cause "the complete destruction and elimination" of the station. In *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 458 (1992), ISOs were totally excluded from the market for fixing Kodak copiers. In *Otter Tail*, 410 U.S. at 371, the defendant "simply refused" to transport any power to municipalities competing with it at the retail level.[2]

By contrast, pursuant to the 1996 Act, AT&T and other CLECs are *using facilities and services provided by the ILECs* to actively compete with Verizon and other ILECs. The CLECs' own websites proclaim their success in using their access to ILEC networks to compete for local telecommunications customers. AT&T declared in March 2003 that "[m]ore than 2.5 million households and half a million small businesses are already enjoying the benefits of competition through AT&T Local Service." http://www.att.com/news/item/0,1847,11519,00.html. MCI publicly advertises "the industry's first truly any-distance, all-inclusive offering combining local and nationwide long distance calling." http://global.mci.com/about/company. And Covad states that its services are "currently available in 96 of the country's top Metropolitan Statistical Areas." http://www.covad.com/companyinfo. All of these service offerings are made possible by the network access that

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[2] As one court of appeals has described *Otter Tail*, it was "an extreme case" in which the defendant "baldly refused to deal" rather than "merely impose[d] some handicap on potential competitors." *Alaska Airlines, Inc.* v. *United Airlines, Inc.*, 948 F.2d 536, 543 (9th Cir. 1991).

Verizon and other ILECs provide to CLECs like AT&T, MCI and Covad pursuant to the 1996 Act. In short, there has been no refusal to deal.[3]

C. Respondent's Allegations Are Not Actionable Under An "Essential Facilities" Theory.

The court below relied on an "essential facilities" variant of this Court's narrow refusal to deal exception to the general rule against forced access. This Court has "never adopted" the "essential facilities" doctrine, *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring), which has been widely and sharply criticized. Judge Posner has condemned the essential facilities doctrine as "having nothing to do with the purposes of antitrust law." *Blue Cross & Blue Shield* v. *Marshfield Clinic*, 65 F.3d 1406, 1412-1413 (7th Cir. 1995). Other "scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access." *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 427 n.4 (D.C. Cir. 2002).

That skepticism is well-founded. Permitting competitors to take a free ride on a purported monopolist's

[3] It is conceivable that, in some contexts, the terms on which a firm offers to deal may be so onerous that the offer itself is tantamount to an actual refusal to deal. But that is not this case. Indeed, any such claim would be foreclosed by the 1996 Act itself. For, if a CLEC deems the terms and conditions on which an ILEC offers access to its network unacceptable, the CLEC has a right to arbitrate those terms and conditions and to seek federal court review of any adverse arbitral determination. Likewise, if an ILEC fails to perform in accordance with its interconnection agreement obligations, the CLEC may invoke state commission jurisdiction to compel such performance.

investment reduces their incentives to build their *own* facilities and thus is more likely to stunt than promote competition. As Judge Tjoflat put it, antitrust law does not permit "horizontal competitors that find it financially inconvenient to build their own physical plant [to] simply tap the resources of the incumbent/monopolist or else sue for treble damages." *Covad*, 314 F.3d at 1288. For that reason, leading commentators urge that "the essential facility doctrine is both harmful and unnecessary and should be abandoned." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 771c, at 173. Similarly, the purported monopolist's incentives to invest in facilities will be reduced if it is required to share those facilities. The reliance of the court below on this discredited theory offers this Court an opportunity to reject it once and for all.

At a minimum, the risk of undermining the bedrock purpose of the antitrust laws—spurring investment and innovation so as to lower producer costs and align consumer prices and costs—counsels against expanding this problematic and controversial doctrine. See *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1357-1358 (Fed. Cir. 1999) ("an unwarranted extension" of essential facilities doctrine risks harm to competition); Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1989). Nor is there any need to do so. As the FCC has explained, the 1996 Act "plainly imposes on incumbent LECs a broader duty to deal with competitors than does the essential facilities doctrine." See *Third Report and Order*, 15 FCC Rcd. 3696, ¶ 60 (1999).

The decision below stretches the essential facilities doctrine beyond recognition. Even those cases accepting the essential facilities doctrine have not applied it when the plaintiff has access to the facility and complains only about the terms of such access. See *Alaska Airlines, Inc.* v.

United Airlines, Inc., 948 F.2d 536, 543-545 (9th Cir. 1991) (rejecting essential facilities claim where defendants "never refused any of the plaintiffs access" to their computer reservation systems and plaintiffs complained only about the terms); *Ideal Dairy Farms* v. *John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996) (business that utilized defendant's premises but complained about terms "was not denied use [of] facilities"); *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir. 1991) (where defendant offered to ship competitor's goods on defendant's track, essential facilities doctrine did not require defendant to lease track to enable rival to earn higher profit). Respondent has not alleged a denial of essential facilities but only a failure to perform as quickly as demanded by Verizon's competitors.

Respondent and its amici have relied heavily on *MCI* v. *AT&T*, 708 F.2d 1081 (7th Cir. 1983), which held that AT&T had unlawfully monopolized based on the essential facilities doctrine. In that case, AT&T "refused to interconnect MCI with the local distribution facilities of Bell operating companies" (*id.* at 1132), "never challenged the assertion that it had denied MCI access to the local distribution network" (*id.* at 1133), and "dismantled all the interconnections" it had previously provided (*id.* at 1134). Respondent alleges no remotely comparable denial of access by Verizon.

Furthermore, AT&T denied MCI a private line service that AT&T voluntarily sold others pursuant to tariff. As the FCC explained in an order quoted by the district court and relied on by the court of appeals, "Bell presently has arrangements * * * with numerous independent telephone companies for access to its local distribution facilities for the purpose of enabling Long Lines and the independent telephone companies to provide FX and CCSA services."

MCI v. *AT&T*, 462 F. Supp. 1072, 1092 (N.D. Ill. 1978), quoting *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, 426 (1974); see also *MCI*, 708 F.2d at 1097. What is more, AT&T admitted that it denied MCI the required access *solely* to harm a disfavored competitor: "With respect to its arrangements with the independent telephone companies for FX and CCSA services, Bell states that the independent companies do not operate on parallel routes or duplicate Bell's facilities and are therefore not competitors." 46 F.C.C.2d at 428.

In contrast, competitors have been *favored* by Verizon and other ILECs. Due to the mandates of the 1996 Act and its implementing regulations, competitors obtain unbundled network elements that are unavailable to noncompetitors and entire services at prices far below what retail customers pay. In particular, competitors have access to the Unbundled Network Element Platform ("UNE-P"), which enables competitors to resell the incumbent's telephone service at cost-based UNE rates rather than at the retail-based resale rates specified by Congress.[4] The essential facilities doctrine has never required, and should not now be expanded to require, a firm to sell services to rivals at prices substantially below what it charges others for those same services. As the Seventh Circuit held in *Goldwasser*, dismissing claims like those of respondent is fully consistent with that court's prior ruling in *MCI*.

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[4] See *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953, ¶ 193 (1999).

Furthermore, the essential facilities theory has never been applied where a statute *guaranteed* access to the very facilities that plaintiff claims to be essential and gave regulators responsibility and power to enforce the access rights in question. Under the 1996 Act, the CLECs themselves hold the keys to resolving *any* access problem. Unlike the situation in *Otter Tail*, where the Federal Power Commission had "no authority" to order a utility to transmit electric power over its transmission lines to requesting municipalities (410 U.S. at 375), the state commissions are fully authorized to resolve such issues. See Part II, *infra*. In other words, ILECs *cannot* refuse CLECs access to loops or other facilities without the approval of the designated regulators. Under section 251(c), an ILEC *must* negotiate in good faith with CLECs to provide access to loops and other facilities, and should the ILEC refuse to provide such access (or refuse to provide it on terms the CLEC believes reasonable) the CLEC can force the ILEC into arbitration before the state commission under section 251(b). See 47 U.S.C. § 251. Should a CLEC believe that an ILEC is not providing the access mandated by a state commission pursuant to the 1996 Act, it can seek relief from the state commission, or seek revocation of an ILEC's long distance authorization or other sanctions from the FCC. See 47 U.S.C. § 271(d)(6). These regulatory remedies assure that neither valid interconnection requests nor access to any "essential facilities" will be denied. In other words, the "control" element of an essential facilities claim cannot as a matter of law be satisfied in this context.

AT&T took full advantage of the 1996 Act's regulatory machinery to resolve its grievances with Verizon, obtaining a consent decree and millions of dollars in damages. Pet. App. 5a. Respondent's antitrust complaint raises the very same issues resolved by the consent decree

and alleges injury that is entirely derivative of the injury previously asserted by AT&T. The heavy artillery of antitrust is not required to compel the very same affirmative assistance that Congress directed state and federal agencies to oversee. In industries subject to extensive regulation, "relief for arbitrary refusals to deal should be left to common law remedies [or] legislation. * * * It is well within the province of the courts in determining the scope of § 2 to leave such matters to them." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 770e, at 169. Because the 1996 Act already conveys highly favorable access to the ILECs' facilities, there is no independent role for the essential facilities doctrine to play.

Extending the essential facilities doctrine to inter-carrier performance issues would violate the antitrust principle that courts should not assume the role of industry regulators. See Hovenkamp, *The Monopolization Offense*, 61 Ohio St. L.J. 1035, 1044 (2000) ("antitrust courts are not public utility agencies"). Prohibiting a particular form of anticompetitive conduct (such as price-fixing or a horizontal boycott) is quite different from imposing an affirmative obligation to deal with rivals. As Justice Breyer has observed, "[e]ven the simplest kind of compelled sharing * * * means that someone must oversee the terms and conditions of that sharing." *Iowa Utils. Bd.*, 525 U.S. at 428. Requiring a defendant "to deal with outsiders requires some mechanism for supervising and adjusting the price and other terms." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 787c, at 305. Must the defendant share with one rival, with several, with all? What prices may the defendant charge? How much of its physical plant must it turn over? How much sharing is optimal? Must the defendant build new facilities or retrofit existing facilities? To what degree must it unbundle

complex network facilities? These are but some of the questions that an antitrust court (and jury) would have to address.

These concerns are underscored by the technicality and complexity of the access and provisioning issues raised by respondent. See R. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 937 (2001) ("communications technology [is] much more difficult [than] the average body of scientific or engineering knowledge that lay judges and jurors are asked to absorb"). As the D.C. Circuit has observed, "there are many different types of loops, including two-wire loops, four-wire loops, analog loops, digital loops, fiber loops, and copper loops," as well as "countless uses to which loops can be put, including residential service, business service, voice service, data service, alarm service, and so on." *AT&T* v. *FCC*, 220 F.3d 607, 624 (D.C. Cir. 2000). Determining the practical need for and feasibility of sharing inputs in an industry with daily-innovations, the adequacy of computerized ordering systems serving multiple carriers, and workable solutions to provisioning delays is not within the province of the courts. Judge Tjoflat properly concluded that trial courts should not serve as "quasi-regulatory agencies [to] oversee sharing between rivals." *Covad*, 314 F.3d at 1288. The "intensely practical difficulties" of resolving disputes in this area are best left to the expert regulators. *Verizon Communications*, 535 U.S. at 502.

Permitting CLECs to demand better provisioning via the essential facilities doctrine also would require ILECs to cede, expand, or alter their existing facilities to accommodate such demands. Neither the essential facilities doctrine nor any other antitrust principle requires a firm to fundamentally alter its business, develop costly new systems, deploy new facilities, or abandon existing

facilities "to satisfy a would-be sharer." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 773e, at 210 (citing cases). As the Fourth Circuit recently noted, the essential facilities doctrine does not compel a firm "to get into a business it was not traditionally in simply to respond favorably to a new competitor's demand for use of its facilities." *Cavalier*, slip op. at 17.

Requiring overburdened federal courts to police the highly technical terms of interconnection performance would reimpose the "government by consent decree" that Congress rejected in the 1996 Act. See 110 Stat. at 143, § 601(a); Conf. Rep. at 198-201. As described by then Assistant Attorney General Charles Rule, head of the Antitrust Division, the "choice of the Department and decree court as substitutes" for "state regulators" was a "big mistake" because regulating inter-carrier performance required "technical expertise, regulatory experience, and a set of administrative procedures." *Antitrust and Bottleneck Monopolies: The Lessons of the AT&T Decree*, reprinted in TELEMATICS, Dec. 1988, at 16. Congress put an end to this "big mistake." As described in Part II, authorizing multiple antitrust courts and juries to oversee inter-carrier relationships would make a dead letter of the 1996 legislation.

For all these reasons, the court below had no ground for reinstating respondent's Section 2 claim based on the "essential facilities" doctrine. As many courts have recognized, futile essential facilities claims should be dismissed at the pleading stage.[5]

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[5] In addition to *Goldwasser*, see, *e.g.*, *Midwest Gas Servs.* v. *Indiana Gas Co.*, 317 F.3d 703, 714 (7th Cir. 2003) ; *International Audiotext Network, Inc.* v. *AT&T*, 62 F.3d 69, 72 (2d Cir. 1995); *Caribbean Broad. Sys.* v. *Cable & Wireless PLC*, 148 F.3d 1080

D. Respondent's Allegations Are Not Actionable Under A "Monopoly Leveraging" Theory.

The Second Circuit's second ground for authorizing respondent's antitrust claim – its monopoly leveraging theory – also conflicts with established limits on antitrust law. That theory would make unlawful a firm's use of its market power in one market to obtain a "competitive advantage" in a second market, even when there is no prospect of achieving a monopoly in the second market. Such a theory cannot be reconciled with this Court's holding in *Spectrum Sports* v. *McQuillan*, 506 U.S. 447, 459 (1993), that unilateral conduct violates Section 2 "only when it actually monopolizes or dangerously threatens to do so." Based on *Spectrum Sports*, conduct that leads to a "competitive advantage" in the second market does not violate Section 2 because it represents neither actual monopolization nor the dangerous threat required for attempted monopolization. See generally Joseph Kattan, *The Decline of the Monopoly Leveraging Doctrine*, 9-Fall ANTITRUST 41 (1994).

Far from barring efforts to obtain a competitive advantage in other markets, antitrust law encourages "dominant firms to engage in vigorous competition." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986). Firms may seemingly obtain an "unfair" advantage through innovations and efficiencies that benefit

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(D.C. Cir. 1998); *TV Communications Network, Inc.* v. *Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir. 1992); *Wojcieszek* v. *New England Tel. & Tel. Co.*, 977 F. Supp. 527, 534 (D. Mass. 1997); *Norcen Energy Resource Ltd.* v. *Pacific Gas & Elec. Co.*, 1994 WL 519461 (N.D. Cal. Sept. 19, 1994); *Futurevision Cable Sys.* v. *Multivision Cable TV Corp.*, 789 F. Supp. 760 (S.D. Miss. 1992), aff'd, 986 F.2d 1418 (5th Cir. 1993).

consumers. But the antitrust laws "do not create a federal law of unfair competition." *Brooke Group*, 509 U.S. at 225. This Court accordingly should reject the Second Circuit's monopoly leveraging rationale.

Furthermore, even when accepted, the monopoly leveraging doctrine has never been applied to the wholesale and retail sides of a *single business*. The implications of such an extension of the monopoly leveraging doctrine are startling. It would preclude an upstream monopolist from selling its product exclusively through its own distribution system based on the potential adverse impact on independent distributors reselling the product to consumers. But it is virtually always lawful under the antitrust laws for a firm to sell what it makes, even if it does so exclusively and disadvantages unintegrated rivals. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 15 (1997); 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 764c. The cost savings from such vertical integration benefit consumers. See 3A Areeda & Hovenkamp, *supra*, ¶¶ 757-758. This Court therefore should reject any extension of monopoly leveraging theory to restrict an integrated firm's freedom to sell its services directly to retail customers.

Finally, as with the essential facilities doctrine, administering the monopoly leveraging doctrine in this context would create an administrative nightmare for the federal courts. Courts are poorly equipped to evaluate whether a manufacturer must supply product to independent resellers and other competitors and, if so, how much, at what price, and on what terms. See 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 774e, at 224 ("courts are not well equipped to deal with [terms of forced access]"). The technical complexities of telecommunications

products and markets underscores the impropriety of assigning such a task to antitrust courts and lay juries.

II. PERMITTING ANTITRUST LITIGATION OVER ROUTINE PERFORMANCE DISPUTES BETWEEN CARRIERS WOULD CONFLICT WITH AND UNDERMINE THE REMEDIAL REGIME ESTABLISHED BY CONGRESS.

If the antitrust laws were stretched to supervise interconnection performance in the manner advocated by respondent, that would undermine the regulatory framework established by Congress in the 1996 Act.

A. This Court's Precedents Require A Careful Evaluation Of The Impact Of Sporadic Antitrust Adjudication On This Unique Regulatory Scheme.

This Court consistently has sought to protect the integrity of the regulatory process and to avoid the conflict and confusion that may result from permitting parallel antitrust and regulatory challenges to the same conduct. In these types of cases, the Court analyzes the regulatory scheme and gauges the practical consequences of antitrust adjudication on effective administrative supervision. See Sullivan & Grimes, THE LAW OF ANTITRUST § 14.5, at 746 (2000) (listing cases). An important factor in that analysis is the Court's longstanding recognition that expert agencies often "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to resolve intra-industry disputes. *Far East Conf.* v. *United States*, 342 U.S. 570, 574-575 (1952).

For example, in *Pan Am. World Airways, Inc.* v. *United States*, 371 U.S. 296, 305 (1963), the Court found that some practices regulated by a federal agency were subject

to antitrust review but not those "basic in this regulatory scheme." In *Hughes Tool* v. *TWA*, 409 U.S. 363, 385 & n.14, 387 (1973), the Court upheld dismissal of an antitrust claim because subjecting conduct that is "under the surveillance" of an expert agency to "the sanctions of the antitrust laws" was inappropriate. The Court reaffirmed this approach in *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 684-686 (1975), explaining that deference to an "oversight" agency is appropriate to "take advantage of its special expertise" and avoid "any conflict arising between the regulatory scheme and the antitrust laws." And in *United States* v. *NASD*, 422 U.S. 694, 734-735 (1975), the Court affirmed dismissal of an antitrust claim because, "[i]n this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that [the industry] would be subjected to duplicative and inconsistent standards." Accord *National Gerimedical Hosp.* v. *Blue Cross*, 452 U.S. 378, 393 n.18 (1981).

As shown below, this careful, case-by-case approach to applying the antitrust laws with due consideration for their relationship with federal remedial statutes is especially warranted here. In 1996, Congress imposed upon ILECs unprecedented duties to cooperate with their competitors – duties never contemplated by, and in many ways foreign to, the antitrust laws. The expert agencies charged by Congress with responsibility for enforcing 1996 Act requirements, unlike antitrust courts, must do so in the broader context of a regulatory scheme that compels them to consider diverse areas of telecommunications regulatory policy—including, for example, requirements that carriers meet service quality commitments to retail customers, provide service as carriers of last resort to end users who cannot be economically served, and support the national defense. This comprehensive regulatory framework must

be considered when determining the propriety of antitrust resolution of particular types of disputes.

B. Antitrust Adjudication Of Disputes Arising Under Interconnection Agreements Would Create Intolerable Conflicts With The Act's Remedial Regime.

In the 1996 Act, Congress entrusted supervision of interconnection duties to state and federal administrative bodies and directed that disputes arising under interconnection agreements be addressed through the Act's dispute resolution process. See 47 U.S.C. §§ 251-252; *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002). State commissions have actively exercised their authority to supervise local carrier relationships and to enforce performance obligations under the 1996 Act and interconnection agreements. In addition, virtually all state commissions have formulated performance plans, standards, and penalties to test ILECs' performance against literally thousands of performance measures and to assist in the identification and resolution of any performance deficiencies.[6] The FCC's resolution of

[6] *E.g.*, *Order Concerning Performance Measurements and Enforcement Mechanisms*, 2002 WL 1448773 (N.C. Utils. Comm'n May 22, 2002); *Notice*, In re Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies, 2003 WL 1040595 (Fla. P.S.C. Feb. 28, 2003); *Order Amending Performance Assurance Plan*, 2003 WL 721469 (N.Y.P.S.C. Jan. 24, 2003); *Order*, In re Performance Measures for Telecommunications Interconnection, Unbundling and Resale, 2002 WL 32071549 (Ga. P.S.C. Dec. 17, 2002); *Order*, In the Matter of Qwest's Performance Assurance Plan, 2002 WL 31954217 (Minn. P.U.C. Nov. 26, 2002); *Final Opinion*, Re Performance Measures Remedies, 2002 WL 32063827 (Pa. P.U.C. Nov. 21, 2002); *Opinion*, Order Instituting Rulemaking on the Commission's Own Motion into Monitoring Performance of Operations Support Systems, 2002 WL 1899988 (Cal. P.U.C. June 27, 2002).

the ordering delay issue in this case shows that it actively exercises its authority in this area as well.[7]

In light of the remedial regime that Congress created to resolve interconnection disputes, "[i]f the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Pan Am.*, 371 U.S. at 309-310. Allowing antitrust lawsuits to proceed in tandem with the regulatory proceedings in this context would disrupt the elaborate administrative scheme that Congress delineated. Lay juries would be asked to second-guess expert agency decisions with respect to exceptionally complex and technical issues. Such an incoherent process inevitably would impose "duplicative and inconsistent standards" on the affected parties. *NASD*, 422 U.S. at 735; *Gordon*, 422 U.S. at 689. That AT&T already has raised and resolved through the regulatory process before the FCC the very issues raised by respondent underscores the seriousness of this conflict. If those same disputes also become subject to antitrust adjudication, the lure of treble damages will lead claimants to bypass the agencies designated to resolve them, and "the procedures and remedies specified by Congress for violations of the Telecommunications Act would become subservient to, indeed overrun by, the Sherman Act." *Cavalier*, slip op. at 21.

[7] The FCC has asserted "concurrent" authority to regulate and impose damages for a breach of interconnection duties. See *In the Matter of Core Communications, Inc.*, No. EB-01-MD-017, ¶¶ 13-17 (FCC rel. Apr. 20, 2003).

The 1996 Act procedures would be rendered incapable of resolving simple carrier-to-carrier disputes if CLECs or consumers are permitted to file claims based on identical disputes, engage in lengthy antitrust litigation, and years later obtain a jury verdict at odds with the administrative ruling. As Judge Tjoflat pointedly asked, "Why would a CLEC ever sue only in contract when it can jettison the regulatory scheme and sue for treble damages in federal court?" *Covad*, 314 F.3d at 1290. Under the Second Circuit's ruling, a party could file an antitrust suit "the day after" agency resolution of interconnection disputes, an absurd result. *Hughes Tool*, 409 U.S. at 388.[8] Congress cannot have intended to authorize such redundancy, which can only promote conflict and obstruct the 1996 Act's dispute resolution machinery.

The fact that Congress modeled the 1996 Act's administrative framework on collective bargaining confirms this conclusion. See *First Report and Order*, 11 FCC Rcd. 15499, 15577 n.292 (1996) (citing NLRB precedent to explain the 1996 Act's good-faith bargaining requirement). As in collective bargaining, CLECs have every opportunity to demand contractual protections in case an ILEC does not perform as promised. They may

[8] In fact, respondent filed this action immediately after the "exclusive remedy" specified in the Verizon-AT&T agreement produced a negotiated resolution of their interconnection dispute. It would be perverse for ILECs that have elected to settle intercarrier performance disputes through the appropriate regulatory processes to find that those settlements are meaningless, serving only as the opening salvo in protracted antitrust litigation. If the "settled" issues are litigated before antitrust courts and juries rather than expert commissions, an ILEC's incentive to settle will be significantly lessened, and the regulatory mechanisms designed to resolve this sort of dispute expeditiously will be bypassed.

seek mandatory penalties for unsatisfactory performance and demand arbitration if the ILEC does not agree to such provisions. See 47 U.S.C. § 252. Good-faith negotiations and contractual performance standards would be rendered meaningless if a party could seek treble antitrust damages whenever it became dissatisfied with the progress of negotiations or performance under resulting agreements. To prevent such a result, this Court long has held that antitrust litigation should not be permitted to disrupt good-faith bargaining governed by federal regulation. See *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 242 (1996); *Associated Gen. Contractors* v. *California Council of Carpenters*, 459 U.S. 519, 526-527 (1983). The same principle applies under the 1996 Act.

The Second Circuit denied that there was any risk of "conflic[t] with the regulatory framework" arising from an action for damages, as opposed to injunctive relief. Pet. App. 38a-39a. But it is well established that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959); accord *Cipollone* v. *Liggett Group*, 505 U.S. 504, 521 (1992). Allowing consumers to bring treble damage class actions based on CLEC grievances over ILEC provisioning would have the same disruptive effect as a judicial injunction. The Second Circuit also suggested a two-track process through which CLECs could resort to regulatory relief while CLEC customers file antitrust suits. This impractical scheme would simply allow CLECs to use consumers as stalking horses and thereby exacerbate the conflict between antitrust adjudication and the regulatory regime.

As explained in the amicus brief filed by SBC, BellSouth, and USTA at the certiorari stage in this case (at

15-16 n.3), the foregoing concerns are confirmed by the extraordinary proliferation of class action litigation that has come in the wake of the decision below. A cottage industry is rapidly developing within the plaintiffs' bar devoted to monitoring disputes between ILECs and CLECs and racing into court with antitrust complaints that demand treble damages and attorneys' fees. In addition to undermining the regulatory process, these actions threaten unconstrained damage awards that will force costly settlements regardless of the merits of the claims and impose serious burdens on the courts.

These opportunistic suits are not driven by any downturn in competition. As early as 2000, the D.C. Circuit noted "the evidence of growing competition in the New York local telephone market." *AT&T* v. *FCC*, 220 F.3d at 633. In fact, CLECs now control 25% of the local telephone market in New York. FCC, *Local Telephone Competition: Status as of June 30, 2002*, Table 7 (Dec. 2002). Nationwide, the FCC's latest statistics show that the number of local telephone lines served by CLECs jumped from 8.2 million in December 1999 to 21.6 million in June 2002. *Id.* Table 1. Those same statistics show rapid growth in competition in those states that CLECs have chosen to target, such as Michigan, where CLEC market share grew from 3% in December 1999 to 18% in June 2002. This objective evidence of increased local exchange competition confirms that the existing scheme of regulation of ILECs' performance under interconnection agreements represents no threat to competition.

C. The Savings Clause Should Not Be Read To Undermine The Act's Remedial Scheme.

The court below relied on the antitrust savings clause in the 1996 Act, 110 Stat. 56, 143, § 601(b)(1), reprinted as note to 47 U.S.C. § 152, to authorize adjudication of

carrier performance disputes. But that provision only confirms that it was improper for the court to "modify" established limits on the scope of the antitrust laws. As demonstrated above, respondent is seeking an enormous "modification" of existing antitrust law by treating 1996 Act duties as if they were antitrust duties, contrary to the unambiguous prohibition in the savings clause against such a modification of antitrust law. See *Cavalier*, slip op. at 19.

The Second Circuit also relied on the Act's savings clause to undermine regulatory procedures established in that very statute. Yet this Court repeatedly has cautioned that savings clauses in regulatory statutes may not be construed to undermine the regulatory scheme. On that basis, dismissal of an antitrust claim was upheld in *Pan Am. World Airways*, notwithstanding the existence of a broadly worded savings clause. 371 U.S. at 310; *id.* at 321 (Brennan, J., dissenting); see also *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 870 (2000) (refusing to "give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law"); *AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998). As explained above, allowing antitrust suits over ordering delays and other performance issues would disrupt the 1996 Act's remedial scheme.

* * * * *

These are not issues that must await discovery and the compilation of a summary judgment record. See note 5 *supra*; 2 Areeda et al., ANTITRUST LAW ¶ 307c, at 68, 71 (2d ed. 2000) (claims of a duty to deal and monopoly leveraging present questions of legal "policy, not of fact"). Allowing these costly and burdensome cases to lumber forward through discovery and possibly to trial would conflict with this Court's admonition that courts should

dismiss deficient antitrust claims at the pleading stage rather than allow "a potentially massive factual controversy to proceed." *Associated Gen.*, 459 U.S. at 528 n.17. Because the antitrust laws do not extend to routine performance disputes between ILECs and CLECs, and because antitrust litigation over those disputes would conflict with and undermine the remedial framework of the 1996 Act, the court below should not have reinstated respondent's antitrust claims.

CONCLUSION

The decision of the Second Circuit should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF VIRGINIA, THE STATES OF ALABAMA, DELAWARE, INDIANA, NEBRASKA, NEW HAMPSHIRE, OKLAHOMA AND UTAH IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICI

The States have significant responsibilities in both antitrust enforcement and enforcement of the regulatory scheme developed by the Telecommunications Act of 1996. The States, therefore, have a strong interest in promoting sound judicial decision-making in the application of antitrust law to activities undertaken pursuant to the Telecommunications Act of 1996 and in promoting the rational development of case law in this area. There are difficult legal issues inherent in subjecting incumbent providers of local telephone services to new duties to assist their competitors, while continuing their obligations under antitrust law. These difficulties counsel a cautious approach which has been utterly forsaken by the decision of the Second Circuit.

ARGUMENT

I. UNDER ANTITRUST PRINCIPLES RECOGNIZED BY THIS COURT, RESPONDENT FAILS TO STATE A CLAIM.

The Second Circuit's opinion expands the duty of incumbent providers of local telephone service to assist competitors beyond the antitrust duties imposed on monopolists under Section 2 of the Sherman Act. Although the Telecommunications Act of 1996 ("the Act") imposes new obligations on incumbent providers to open their markets to competition, it does not alter the applicability of the Sherman Act. Instead, Congress expressly provided that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152 note. Thus, the elements of an

antitrust action remain the same. The Second Circuit's opinion is problematic because it permits an antitrust claim to go forward absent factual allegations supporting all elements required under Section 2 of the Sherman Act.

The Act provides that incumbent local exchange carriers must allow entering competitors to interconnect with incumbents' telephone networks on terms to be worked out between the incumbents and the new entrants. State public utility commissions ("State Commissions") are to arbitrate the agreements between the incumbents and their competitors, and the State Commissions have authority to set rates "that would subject both incumbents and entrants to the risks and incentives that a competitive market would produce." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002). *See also* 47 U.S.C. 251(c).

The duties imposed on a monopolist under the antitrust laws, however, are different from the duties imposed on the incumbents under the Act. Under antitrust law, even a firm with monopoly power has no general duty to assist its rivals. *Aspen Skiing Co. v. Highlands Skiing Corp.*, 472 U.S. 585, 600-01 (1985). *See also Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986) (Posner, J.). In addition, a monopolist that has obtained its position lawfully can reap the benefits of its success by demanding whatever rates it can receive from the marketplace. Such conduct, standing alone, is not an antitrust violation. *Alaska Airlines v.*

United Airlines, 948 F.2d 536, 548-49 (9th Cir. 1991).[1] As this Court has acknowledged:

> The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

A. The Traditional Elements of a Section 2 Claim

In order for "monopolization" to be a violation of Section 2 of the Sherman Act, two elements must be shown: (1) the possession of monopoly power, defined as the power to control prices or exclude competition, *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956); and (2) deliberateness. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The "deliberateness" element has been defined as "the *willful* acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* (emphasis added). Deliberateness has also been described as "anticompetitive,"

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[1] In stark contrast to the regulation of telephone rates by State Commissions, the antitrust laws specifically decline the responsibility of setting the rates that monopolists can charge. *See Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute").

"predatory," or "exclusionary." 3 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, 650c, at 69 (2d ed. 2002); *Aspen Skiing*, 472 U.S. at 602.

The deliberateness element is absent when a monopolist engages in conduct that disadvantages a competitor, but does so in pursuit of legitimate business objectives or to enhance efficiency. *See, e.g., Aspen Skiing*, 472 U.S. at 604-05; *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 927 (4th Cir. 1990) ("A desire to increase market share or even to drive a competitor out of business through vigorous competition on the merits is not sufficient."). The monopolist who violates Section 2 is the one who adversely affects competition by engaging in economically irrational behavior. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (the sacrifice of short-term profits may be viewed by the predator as "an investment in future monopoly profits (where rivals are to be killed)," *quoting* Robert Bork, *The Antitrust Paradox* 145 (1978)); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990) ("If a plaintiff shows that a defendant has harmed consumers and competition by making a short-term sacrifice in order to further its exclusive, anti-competitive objectives, it has shown predation by that defendant.").

This Court's opinion in *Aspen Skiing* further explained that, in order for conduct to be "exclusionary," it must do more than merely harm a smaller rival. It must impair competition in an "unnecessarily restrictive way." 472 U.S. at 605. "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* (*quoting* Bork, *supra*, at 138 (1978)).

A monopolist does not have to cooperate with its rivals under the antitrust laws, unless the refusal to deal constitutes purposeful and anticompetitive conduct. *Aspen Skiing*, 472 U.S. at 600-01. In order for failure to cooperate with a rival to be "exclusionary" under Section 2, at a minimum it must occur without a legitimate business or efficiency reason and make no economic sense other than as an intentional effort to injure competition by preserving or acquiring higher monopoly profits. *Id.* at 608, 610-11. *See also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-83 (1992).

Respondent failed to allege exclusionary conduct in this case. The Second Circuit, however, decided that the amended complaint was sufficient to state a claim under either the essential facilities doctrine or a monopoly leveraging theory. Pet. App. 29a. Its decision, if upheld, would unreasonably expand the scope of antitrust law in the telecommunications context beyond any theory approved by this Court, a result not contemplated by the Act and not necessary to enforce either the Act or antitrust law.

B. The Theories Relied Upon by the Second Circuit, Without More, Do Not Establish an Antitrust Violation.

1. Even if the Essential Facilities Doctrine Can Serve as the Basis for a Section 2 Monopolization Claim, the Traditional Elements of the Section 2 Claim Must Be Pled.

First, this Court has "never adopted" the essential facilities doctrine as a basis for liability in a Section 2 case. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer,

J., concurring in part and dissenting in part). In addition, the doctrine has been widely criticized by leading antitrust commentators. *See, e.g.*, 3A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 771c, at 173 (2d ed. 2002) ("the essential facility doctrine is both harmful and unnecessary and should be abandoned"); Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 Antitrust L.J. 443, 443 (2002) ("If U. S. scholarship were the last word on the subject, one would be led to conclude that the essential facilities doctrine should be described narrowly or fully abandoned.").[2]

Second, although respondent may have adequately pled the elements peculiar to an essential facilities claim,[3] it still must allege all other elements of a Section 2 monopolization violation. As discussed above, a Section 2 violation requires "exclusionary" or "predatory" conduct by the monopolist. The essential facilities doctrine does not and should not be permitted to eliminate the need to allege deliberateness in order to state a Section 2 violation. *See, e.g.*, 3 Areeda & Hovenkamp, *supra*, ¶ 650c at 69. In addition,

[2] There are four elements that are said to establish liability under the essential facilities doctrine:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

[3] The Second Circuit found that respondent did allege that AT&T's access to petitioner's local loop was essential to AT&T's ability to compete in the local telephone service market and that it would be prohibitively expensive for it to create independent facilities. Pet. App. 29a.

several lower courts have rejected essential facilities claims in regulated industries because the defendants were found to have legitimate business reasons for denying access to the essential facility. *See, e.g., Southern Pac. Communications Co. v. AT&T*, 740 F.2d 980, 1009 (D.C. Cir. 1984) (holding that AT&T's regulatory justification defense for denial of access to its telephone network, based on its status as an entity regulated under a "public interest" standard, was reasonable and made in good faith, rather than because of competitive considerations); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1381 (9th Cir. 1992) (holding that defendant had a legitimate business reason for denying access to its low-cost power source, so that its entire customer base could benefit from its low-cost power, rather than having it siphoned off by only a few customers).

Even under an essential facilities theory, respondent must show that petitioner has an *antitrust* duty, not just a duty under the Act, to provide access to the local exchange network. In order to establish this antitrust duty, respondent must allege that petitioner's failure to provide such access would not make economic sense unless it intended to harm competition in the local telephone service market.[4] Respondent has not done so.

[4] In their amicus brief supporting petitioner's request for review by this Court, the United States and the Federal Trade Commission noted that respondent did allege that petitioner "had no valid business reason" for its behavior. Brief for the United States and the Federal Trade Commission as Amici Curiae, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, on petition for a writ of certiorari, Dec. 17, 2002, at 13. As the United States pointed out, however, a conclusory legal assertion couched as a factual allegation is not a sufficient

(Continued on following page)

2. Allegations of a Dangerous Probability of Monopolizing a Second Market are Necessary to State a Monopoly Leveraging Claim.

As with the essential facilities doctrine, the Second Circuit treats monopoly leveraging as if it constitutes a stand-alone violation of Section 2, absolving respondent of the need to plead all necessary elements of such a violation. This Court has never accepted such a view of monopoly leveraging. The Second Circuit found that a monopoly leveraging claim can be made by alleging that a monopolist in one market is using that power to gain a "competitive advantage" in a second market. Pet. App. 30a. But this sets the bar too low. As this Court has explained, a firm does not violate Section 2 unless it actually monopolizes or dangerously threatens to monopolize the second market. *Spectrum Sports,* 506 U.S. at 459. No antitrust claim is made under the Court's existing antitrust jurisprudence when the firm is alleged merely to use its dominant position in one market to gain a competitive advantage in another. *See* 3 Areeda & Hovenkamp, *supra*, ¶ 652a, at 89-90.

Some circuits have reserved judgment on whether a monopoly leveraging claim requires showing a dangerous probability of monopolizing a second market instead of showing merely that the monopolist gained a competitive advantage in that market. *See, e.g., M & M Med. Supplies &*

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allegation of exclusionary conduct that makes no economic sense except to harm competition. *Id.* at 14 (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Serv. v. Pleasant Valley Hosp., 981 F.2d 160, 169 (4th Cir. 1992) (en banc); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984); *Willman v. Heartland Hosp. E.*, 34 F.3d 605, 613 (8th Cir. 1994). However, two other circuits have decided the issue. They require proof of a dangerous probability of success in monopolizing the second market, noting that the antitrust laws allow monopolies that have arisen from efficiency and natural market forces, and therefore, attaching antitrust liability when a firm merely gains a competitive advantage in another market does violence to traditional Section 2 analysis. *Fineman v. Armstrong World Industries*, 980 F.2d 171 (3d Cir. 1992); *Alaska Airlines,* 948 F.2d at 536.

Respondent's amended complaint alleges that petitioner has monopoly power over a wholesale market in which it provides access to the local network exchange to competitive carriers. J.A. 29. Respondent further alleges that petitioner uses its power in the wholesale market to gain a competitive advantage in a retail market in which both petitioner and its competitors sell local telephone service to consumers. *Id.* A claim under the Sherman Act, however, is not implicated by the conduct pled unless respondent also alleges that petitioner was using anticompetitive behavior to create a second monopoly in the retail local telephone service market:

> . . . the elements of the established actions for "monopolization" and "attempted monopolization" are vital to differentiate between efficient and natural monopolies on the one hand, and unlawful monopolies on the other. . . . The anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses its power to

> gain a competitive advantage in the second market. By definition, the monopolist has failed to gain, or attempt to gain, a monopoly in the second market. Thus, such activity fails to meet the second element necessary to establish a violation of Section 2. *Unless the monopolist uses its power in the first market to acquire and maintain a monopoly in the second market, or to attempt to do so, there is no Section 2 violation.*

Alaska Airlines, 948 F.2d at 548 (emphasis added). This element is missing from respondent's allegations.

In sum, just as the allegation of a monopoly position in a market, by itself, does not state a Section 2 monopolization claim, so, too, the allegation of the *use* of monopoly power, without more, does not state a claim for the deliberate acquisition or maintenance of monopoly power in violation of Section 2. A necessary element of the claim is that the challenged conduct lacks any business justification other than an intent to harm competition. This element is absent from the Second Circuit's two antitrust theories of liability and was not alleged in respondent's amended complaint. Thus, the Second Circuit's decision transforms duties that the incumbent local exchange carriers must perform under the Act (including duties under incumbent-competitor contracts arbitrated by State Commissions) into antitrust duties. Such an expansion of potential antitrust liability eliminates one of the traditional elements of a Section 2 Sherman Act claim. It has no precedent in this Court's jurisprudence and is unwarranted.

II. IN PASSING THE TELECOMMUNICATIONS ACT OF 1996, CONGRESS INTENDED NEITHER TO EXPAND NOR TO CONTRACT THE AVAILABILITY OF AN ANTITRUST CLAIM.

A. State and Federal Regulation is a Proper Consideration in Antitrust Analysis.

"[W]here regulatory and antitrust regimes coexist, antitrust analysis must sensitively 'recognize and reflect the distinctive economic and legal setting' of the regulated industry to which it applies." *Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (citations omitted) (Breyer, C.J.). This is not to say that a regulated entity has immunity from antitrust laws or that antitrust laws are unenforced in a regulated environment. *Id.* at 21-22. Rather, as the First Circuit recognized in *Concord*, "antitrust courts can and do consider the particular circumstances of an industry" and adjust the rules to the existence, extent and nature of regulation. *Id.* at 22-23 (citation omitted). In *Concord*, the First Circuit noted the difficulty in addressing the antitrust allegation without acting like a regulatory agency. *Id.* at 25-26. When a function is already served by regulators, courts are rightfully reluctant to perform such an undertaking. Similarly, the Seventh Circuit has explained that "[a]n industry's regulated status is an important 'fact of market life,' the impact of which on . . . competitive decisions is too obvious to be ignored." *MCI Communications Corp.*, 708 F.2d at 1105 (citation omitted).

Respondent attempted to allege an antitrust action arising out of conduct that is the subject of extensive state and federal regulation. The Second Circuit abandoned traditional antitrust analysis to permit respondent's claim to go forward. In so doing, it has written substantial new

antitrust law without adequate consideration of the regulated nature of the relevant market. Although this Court has not addressed the question whether or how a regulatory scheme should impact antitrust analysis, the opinions of the First and Seventh Circuits provide useful guidance.[5] At a minimum, they support a finding that the Act was not intended to create new and lower standards for pleading an antitrust cause of action in the telecommunications industry. But that is precisely what the Second Circuit did.

B. By Enacting the Telecommunications Act of 1996, Congress Built on the Traditional Authority of States to Regulate Providers of Local Telephone Service.

The express purpose of the Act is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996). To that end, the Act calls upon the States to perform an important role in facilitating transition to a competitive market. The provisions of the Act recognize and rely upon "the benefit of employing the vast resources and expertise of State public service commissions to resolve ongoing disputes arising from the

[5] A leading antitrust scholar claims that the antitrust savings clause in the Act "preserves not merely the basic application of the antitrust laws, but also the system of regulatory deference and express or implied immunity in favor of federal and state agencies that has always governed antitrust disputes in regulated or partially deregulated industries." 3A Areeda & Hovenkamp, *supra*, ¶ 785b2 at 292.

administration and interpretation of interconnection agreements." *Bell Atlantic-Maryland Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 305 (4th Cir. 2001), *vacated and remanded on other grounds*, 535 U.S. 635 (2002). The Act employs the State Commissions in a variety of roles to carry out its purposes.

Under the Act, State Commissions may be called upon to mediate differences between incumbents and competitors engaged in negotiating the terms of interconnection agreements. 47 U.S.C. § 252(a)(2). They serve as arbitrators of open issues that cannot be resolved through the parties' good faith negotiations. 47 U.S.C. § 252(b). In the context of these arbitrations, State Commissions may establish rates for interconnection, services, or network elements, and may impose conditions upon the parties that they deem necessary to ensure that the interconnection obligations created by the Act are met. 47 U.S.C. §§ 252(c), (d). Ultimately, the State Commissions must approve all interconnection agreements, whether developed through negotiation or arbitration. 47 U.S.C. § 252(e).

By including in the Act a statutory role for State Commissions, Congress utilized the infrastructure and expertise closest to the local exchange service markets – State Commissions – to facilitate the transition to a competitive market. Congress' reliance on that regulatory role for the States argues against the Second Circuit's expansion of antitrust claims to include claims based solely on the duties imposed by the Act. As shown by the savings clause, found at 47 U.S.C. § 152 note, the Act was not intended to limit antitrust claims, but neither was it intended to alter the elements or lower the bar for successfully pleading them.

C. The Decision of the Second Circuit is Unreasonably Expansive in Light of the Regulatory Oversight Established by Congress and Could Hamper the States' Ability to Facilitate Transition to Market Competition.

There is currently a combined state and federal regulatory system in place pursuant to the Act to facilitate the transition of the local telephone market to competition. In fact, the conduct that respondent complains of was the subject of a regulatory proceeding before the FCC and the New York Public Service Commission.[6] Any antitrust claim based on the same conduct must conform to traditional antitrust law. As explained above, respondent's pleading omits allegations that, if true, would establish a necessary element of an antitrust cause of action. Omitting these allegations expands the reach of antitrust jurisprudence. Such an expansion could be counterproductive in the context of the regulatory framework established by Congress. Where such an expansion was not clearly intended by Congress, it is important that it not be undertaken without recognition of the impact that such an expansion of antitrust law in the telecommunications area might have, given the regulatory structures in place for enforcement of the Act.

[6] Order, *In re: Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, Interlata Service in the State of New York*, 15 F.C.C.R. 5413 (Mar. 9, 2000); Order Directing Improvements to Wholesale Service Performance, *MCI WorldCom Inc. v. Bell Atlantic-New York*, 2000 WL 363378 (N.Y.P.S.C. Feb. 11, 2000); Order Addressing OSS Issues, *MCI WorldCom Inc. v. Bell Atlantic-New York*, 2000 WL 1531916 (N.Y.P.S.C. Jul. 27, 2000).

There is inherent tension between the operation of a congressionally prescribed state and federal regulatory structure, like that provided by the Act, and the use of antitrust laws to enforce the provisions of the same Act. This tension arises on at least three fronts:

- the unique regulatory expertise in highly technical subject matter that resides in the State Commissions and the FCC, and which is not typically found in courts hearing private antitrust enforcement actions;
- the potential for conflicting adjudications regarding incumbent obligations arising under the Act in regulatory proceedings as compared to federal antitrust actions and the effect such uncertainty might have on the anticipated transition of the market to competition; and
- the absence, in private antitrust actions, of the unique representation of the public interest provided by the state regulatory body.

The existence of these tensions does not mean that the regulatory mechanisms set forth by Congress preclude the continued operation of traditional antitrust principles in the telecommunications industry. The tensions do underscore, however, the complexity implicit in the coexistence of the two enforcement schemes and the resulting need for caution in using the Act as an occasion for reducing the elements necessary to make out a claim under Section 2 of the Sherman Act. The consequences of unnecessary and unanticipated changes in the reach of antitrust law as applied to activity under the Act are difficult to predict, and the careful balance of competing concerns demanded by the nature of the telecommunications market, counsel

against adoption of the ill-advised decision of the Second Circuit in this case.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Second Circuit should be REVERSED.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE COMMUNICATIONS WORKERS OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF FOR THE COMMUNICATIONS WORKERS OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

This brief *amicus curiae* is filed by the Communications Workers of America with the written consent of the parties, as provided in the Rules of this Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The Communications Workers of America (CWA) is a labor organization which represents more than 730,000 members in communications, information services, media, broadcast and publishing, higher education, health care and public service, the airline industry and manufacturing. Over 500,000 of CWA's members work for wireline, cable and wireless companies serving all segments of the communications industry.

The experience under the Telecommunications Act of 1996 raises a critical concern about legal rules that require incumbent local telephone companies to make portions of their operational facilities available to aspiring competitors to enable the latter to provide the same communications services to the same class of customers: *viz*. that such rules serve to discourage capital investment in creating, improving and maintaining telecommunications networks—both by the incumbents and by their aspiring competitors. Such a reduction in investment in the telecommunications infrastructure results in an accompanying reduction both of employment opportunities for the thousands of telecommunications workers who manufacture network components and who construct and maintain such networks and of the telecommunications

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[1] Counsel for a party has not authored this brief in whole or in part. No person or entity other than the *amicus curiae*, their members, or their counsel, has made a monetary contribution to the preparation or filing of this brief.

industry's capacity to provide customers with the most reliable and advanced telecommunications services.

Because of this concern CWA has participated in the proceedings before the Federal Communications Commission on the implementation of the Telecommunications Act's operational-facility-sharing rules. And it is because of this concern that CWA seeks to address the claim in this case that the antitrust laws impose a second separate and independent duty—enforceable through treble damages jury litigation—on incumbent local telephone companies to make portions of their operational facilities available to aspiring competitor communications companies. Indeed, CWA has a particularly strong interest in this case because a ruling that the antitrust laws create such a duty would most certainly act as a heightened deterrent to new job-creating capacity-enhancing capital investment in the telecommunications infrastructure.

SUMMARY OF ARGUMENT

Plaintiff-Respondent Trinko claims that the antitrust laws impose a duty on a business firm which operates in a government-regulated "natural monopoly" market to make a portion of its operational facilities available to third-party business firms on just, fair and reasonable terms to enable those other firms to act as competitors in that market providing the same services to the same class of customers. The court in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) rejected an identical claim, and rightly so.

1. *Goldwasser*'s holding that the antitrust laws do not impose such a duty is firmly rooted in the restraint-of-trade common law that forms the background for the Sherman Act. As exemplified by this Court's decision in the *Express Cases*, 117 U.S. 1 (1886), at common law a monopolist public utility did *not* have a duty to share a portion of its operational facilities with other firms to enable them to act as competitors in the natural monopoly market providing the same services to the same class of customers.

Goldwasser's holding that the antitrust laws do not impose such a duty likewise is firmly rooted in the most basic antitrust law principles and policies. The office of the antitrust laws is to police workably competitive markets—*i.e.*, markets that by their nature are conducive to business competition in the absence of certain forms of private conduct tending to prevent or inhibit such competition. Conversely, natural monopoly markets—*i.e.*, markets that it is claimed cannot efficiently support more than one firm—have always functioned under, and been structured by, a "classical regulation" regime and not an antitrust regime.

That being so, the question whether a monopolist public utility operating in a government-regulated natural monopoly market should be compelled to share its operational facilities with aspiring competitors in that market—and, if so, on what terms—is *not* an antitrust question to be answered through the judicial process, but a "classical regulation" question to be answered through such regulation's more finely-tuned legislative/quasi-legislative processes. Quite appropriately, then, this question *has been answered* for the monopolist public utilities operating in government-regulated local telephone services markets across the country in the Telecommunications Act of 1996 and in the numerous and complex administrative regulations implementing the Telecommunications Act's proscriptions.

2. This Court's sharply-divided 4-3 decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) is not, as the court below suggested, to the contrary. Taken on its own terms, *Otter Tail* holds that it can be a Sherman Act § 2 violation for a monopolist public utility operating in a government-regulated natural monopoly market to refuse to share a facility with or otherwise cooperate with a third party where that refusal impairs competition *in an adjacent workably competitive market*. Thus, while the defendant in *Otter Tail* was, as here, a monopolist public utility, the point

of that Sherman Act case was *not* to displace "classical regulation" as the means of structuring the utility's natural monopoly market, but rather to further the core antitrust law purpose of policing an adjacent workably competitive market.

For this reason, whether *Otter Tail* is correct on its own terms need not be decided here. But *Otter Tail* may merit reconsideration in an appropriate case, inasmuch as it rests on the dubious premise that the courts through antitrust litigation are equipped to regulate certain discrete aspects of the conduct of a monopolist public utility operating in a government-regulated natural monopoly market (*viz.*, conduct affecting competition in adjacent workably competitive markets) without undermining the duly-considered and duly-authorized policy decisions of the regulators exercising primary jurisdiction over the public utility industry as a whole.

3. The court below was even further afield in suggesting that *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) supports Trinko's antitrust claim. The *Aspen Skiing* Court rejected as inapposite the defendant Ski Co.'s reliance on the general "no [antitrust law] duty to cooperate with business rivals" rule that governs where the refusal to cooperate is by a monopolist public utility operating in a government-regulated natural monopoly market for the following reason: Ski Co. was operating *in a workably competitive market* in which its competitor Highlands also operated, and it was therefore appropriate to evaluate, under Sherman Act § 2, Ski Co.'s actions toward Highlands that enabled Ski Co. to dominate that market to determine whether those actions were improperly anticompetitive or exclusionary. Thus, far from supporting Trinko's antitrust claim, *Aspen Skiing* underscores the point that we submit is fatal to that claim—*viz.*, that the office of the antitrust laws is to police workably competitive markets, and not to restructure government-regulated natural monopoly markets.

ARGUMENT

I.

Plaintiff-Respondent Trinko's claim in this case is that the antitrust laws impose a duty on a business firm which operates in a government-regulated "natural monopoly" market—here Defendant-Petitioner Verizon, a firm which provides local telephone services to a class of customers—to make a portion of its operational facilities available to third-party business firms on just, fair and reasonable terms to enable those other firms to act as competitors in that market providing the same services to the same class of customers.[2]

In *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the Seventh Circuit—in an opinion by Judge Diane Wood, an antitrust law professor and former Justice Department Antitrust Division official—upheld the Rule 12(b)(6) dismissal of a Sherman Act § 2 complaint making the same claim Trinko makes here:

> A complaint like this one, which takes the form "X is a monopolist; X didn't help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high" does *not* state a claim under [Sherman Act] Section 2. *The*

[2] It perhaps is more accurate to characterize Verizon as a quasi-monopolist in the market for local telephone services. For the Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56, imposes a statutory duty on Verizon to share its facilities with aspiring competitors in that market and by force of this statutory requirement the market itself is in the process of being transformed from a pure natural monopoly market to a hybrid natural monopoly market. But inasmuch as Trinko's complaint proceeds on the premise that Verizon is a monopolist operating in a natural monopoly market in posing the question whether Petitioner has an *antitrust* duty to share its facilities with aspiring competitors *that stands independent of the Telecommunications Act of 1996 and thus would exist even if that landscape-changing Act never had been passed*, we accept Trinko's premise for the limited purpose of addressing that antitrust question.

> *reason is because the antitrust laws do not impose that kind of affirmative duty, even on monopolists.* [*Id.* at 400 (emphasis added).]

In other words, "the kinds of affirmative duties to help one's competitors"—such as the alleged duty on monopolist public utility A at issue in *Goldwasser* and in the instant case to make A's operational facilities available to aspiring competitor B on just, fair and reasonable terms to enable B to provide the same services as A is providing to the same class of customers—"do not exist under the unadorned antitrust laws." *Id.*

Goldwasser's statement of the limits of the antitrust laws—which is firmly rooted in the restraint-of-trade common law that forms the background for the Sherman Act, and in the most basic antitrust law principles and policies—is, we submit, entirely sound and correct.

A. This Court has recognized "that Congress intended the [Sherman] Act to be construed in the light of its common-law background." *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 531 (1983). Accordingly, it is very much to the point that "[a]t common law a public utility had a general duty to deal with paying customers; however, the duty did *not* generally extend to rivals . . . ." IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 787c, at 301 (2d ed. 2002) (emphasis added) (footnote omitted).

The two leading common law authorities on this point are *Jencks v. Coleman*, 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,258) (Story, J.) and this Court's later decision in the *Express Cases*, 117 U.S. 1 (1886). In the *Express Cases*, the Court held that the defendant railroads—which were "able, ready and willing to do the express carrying business over [their] road[s] for [themselves], and for the benefit of [their] own stockholders, and desir[ed] to take the business into [their] own hands," *see* 117 U.S. at 9; *see also id.* at 14—

acted lawfully in refusing on that basis to make their operational facilities available to the plaintiff express companies to enable the latter to conduct express carrying businesses of their own.[3]

Cases recognizing the applicability of this common law rule to local telephone companies operating in government-regulated natural monopoly markets include *People ex rel. Oneida Telephone Co. v. Central New York Telephone & Telegraph Co.*, 41 A.D. 17 (N.Y. App. 1899), where the court stated that "[a]t the common law, one common carrier could not demand as of right that it be permitted to use its rival carrier's property for the benefit of its own business," *id.* at 19; and *Home Telephone Co. v. Granby & Neosho Telephone Co.*, 126 S.W. 773 (Mo. App. 1910), where the court stated that "[i]t is the law, too, without doubt, that common carriers may not be required, on the assertion of a primary duty in the first instance, to turn over or surrender the physical use of their instrumentalities to a rival concern," *id.* at 778.

B. *Goldwasser* and its common law antecedents point up the distinction between the antitrust laws—whose office is to order "workably competitive" markets and the business firms operating in those markets—and "classical regulation"—whose office is to order "natural monopoly" markets and the monopolist public utility companies operating in the latter.

The antitrust laws "[p]olice[ ] . . . 'workably competitive' markets"—*i.e.*, markets that by their nature are conducive to business competition in the absence of "certain forms of

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[3] In *Jencks*, Justice Story, sitting on circuit, held that a steamship company which had contracted with a stage coach company (the Citizens' line) to pick up its passengers at the dock and transport them to their final destination had no duty to act in a manner "incompatible with [its] interests" by taking on board its ship an employee of a rival stage coach company (the Tremont line) "avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors." 13 F. Cas. at 444.

private conduct" tending to "prevent or inhibit [such] competition." S. Breyer, *Regulation and Its Reform* 156-57 (1982). And, given the nature of those markets, the antitrust laws

> act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct [tending to prevent or inhibit competition]. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do. They are enforced through adjudicatory proceedings in court (or before the Federal Trade Commission). Only rarely do the antitrust enforcement agencies create the detailed web of affirmative legal obligations that characterizes classical regulation. [*Id.* at 157 (emphasis in original).] [4]

Professor Breyer (as he then was) summed up the pertinent point for present purposes as follows: "For these reasons, antitrust is more accurately contrasted with, rather than viewed as another form of, governmental regulation." *Regulation and its Reform*, at 157.

"Natural monopoly" markets—*i.e.*, markets that "it is claimed, cannot efficiently support more than one firm," *Regulation and its Reform*, at 15—are not structured like, do not function like, and are not expected to function like workably competitive markets. And, given their nature, natural monopoly markets—which are not suited to being ordered through antitrust laws attuned to ordering workably competitive markets—have functioned under a "classical regulation" regime and not an antitrust regime. Natural monopoly markets are, in other words, structured by the

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[4] The Sherman Act § 2 provision here at issue is a case in point, providing in the most general, prohibitory terms that

> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony .... [15 U.S.C. § 2.]

imposition of the kind of "detailed web of affirmative legal obligations" on the monopolist public utility that is foreign to the antitrust laws. *Id.* at 15, 157.

It follows that the question whether a monopolist public utility operating in a government-regulated natural monopoly market should be compelled to share its operational facilities with aspiring competitors in that market—and, if so, on what terms—is *not* an antitrust question to be answered through the judicial process, but a classical regulation question to be answered through such regulation's more finely-tuned legislative/quasi-legislative processes.

As a threshold matter, answering this question requires the making of the delicate policy judgment that competition achieved through legally mandated and supervised aspiring competitor access to a monopolist public utility's operational facilities is preferable to the traditional method of curbing a monopolist public utility's market power—*viz.*, "governmental regulation of [its] prices and profits." *Regulation and its Reform*, at 15. That delicate policy judgment is *not* one that Congress made long ago in enacting the Sherman Act, as we have seen. To the contrary, it is one that must ultimately depend on a "detailed analysis" of, and a serious debate over, the costs and benefits of providing for this kind of government compelled "competitive solution[ ]" to the problems posed by a particular natural monopoly market. *Id.* at 314.[5]

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[5] Such a detailed analysis and serious debate did in fact take place over the course of several years prior to the enactment of the Telecommunications Act of 1996. *See, e.g., Communications Law Reform: Hearings on H.R. 1555 Before the Subcomm. on Telecomms. and Finance, House Commerce Comm.*, 104th Cong. 21-48, 88-92, 149-151 (1995); *Communications Act of 1994: Hearings on S. 1822 Before the Subcomm. on Antitrust, Monopolies, & Business Rights, Senate Judiciary Comm.*, 103rd Cong. 6-15 (1994); *Hearings on S. 1822 Before the Senate Commerce, Science, & Transp. Comm.*, 103rd Cong. 10-19, 407-417, 443-449, 543-549, 576-584 (1994); *Hearings on H.R. 3626 Before the*

Beyond that threshold policy judgment lies the equally difficult matter of establishing and enforcing the terms on which the legally mandated sharing of the monopolist public utility's operational facilities with aspiring competitors is to be afforded. In the *Express Cases*, *supra*, this Court—in rejecting the proposition that the defendant railroads had an affirmative common law duty to share their operational facilities with express company competitors—made much of the quintessential classical regulation by the courts the opposite conclusion would entail:

> Having found that the railroad company should furnish the express company with facilities for business, [the lower court] had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities, and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities, or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. [117 U.S. at 28-29.]

All that being so, the Court concluded:

> In this way, as it seems to us, "the [lower] court has made an arrangement for the business intercourse of

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Subcomm. on Telecomms. & Finance, House Energy & Commerce Comm., 104th Cong. 383-392 (1994); *Telecomms. Infrastructure Act of 1993: Hearings on S. 1086 Before the Subcomm. on Communication, Senate Commerce, Science, & Transp. Comm.*, 103rd Cong. 72-74 (1993).

> these companies such as, in its opinion, they ought to have made for themselves," and that, we [previously have] said . . ., could not be done. The regulation of matters of this kind is legislative in character, not judicial. [*Id.* at 29 (internal citations omitted).]

The Sherman Act, which takes its lead from the restraint-of-trade common law, likewise affords no basis upon which a court legitimately could undertake "[t]he regulation of matters of this kind." Rather, once the policy decision has been made by Congress to provide for a particular kind of competition forcing solution to the problems posed by a particular natural monopoly market, the necessary and proper course is for Congress—and/or other bodies acting pursuant to, and within the bounds of, delegated congressional authority—to flesh out the details for effectuating that decision. With respect to the local telephone services markets across the country, the Telecommunications Act of 1996 and its implementing regulations do indeed flesh out those details—which, as is only to be expected, are numerous and complex. *See generally Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

Judge Posner, in his pithy way, summed up the matter as follows:

> [I]t is clear that a firm with lawful monopoly power has no general duty to help its competitors . . . . There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter. So if a firm went to a monopolist and said, "Please—for the sake of competition—give me a loan so I can compete with you and make this a competitive market," and it was turned down, it could not invoke the Sherman Act. [*Olympia Equip. Leasing v. Western Union Tel.*, 797 F.2d 370, 375-76 (7th Cir. 1986) (internal quotations and citations omitted).]

So too if that aspiring competitor went to a monopolist public utility and said, "Please—for the sake of competition—share your operational facilities with me for fair recompense so I can compete with you by providing the same service you provide to the same class of customers and make this a competitive market," and it was turned down, it could not invoke the Sherman Act.

II.

To be sure, workably competitive markets and government-regulated natural monopoly markets are not watertight compartments. As a consequence there are a number of lower court cases treating with the question of the antitrust duty *vel non* of a monopolist operating in a government-regulated natural monopoly market to share a facility with or otherwise cooperate with a third party in circumstances where the imposition of the duty is in the interest of *protecting competition in an adjacent workably competitive market* rather than in the interest of *restructuring the natural monopoly market*. The one such case to reach this Court—and the case mistakenly relied upon by the court below, *see* Pet. App. at 34a-36a—is *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

A. The pertinent facts in *Otter Tail* were these: Otter Tail Power Co. ("Otter Tail") was a full-service electrical utility company that generated, transmitted/"wheeled" and sold electrical power under various arrangements within the States of Minnesota, North Dakota and South Dakota. 410 U.S. at 368. Otter Tail owned the only transmission line capable of "wheeling" electrical power to the town of Elbow Lake, Minnesota, *id.* at 370, and on that account wielded substantial "monopoly power" vis-à-vis Elbow Lake, *id.* at 377. For many years, Elbow Lake granted Otter Tail a franchise to sell Otter-Tail-generated and Otter-Tail-"wheeled" electrical power to Elbow Lake citizens at retail. *Id.* at 370-71. Desirous of terminating Otter Tail's retail

franchise and establishing its own municipal power system, Elbow Lake constructed its own generating plant and asked the Bureau of Reclamation and various cooperatives to sell it additional power at wholesale. *Id.* at 371. The Bureau and the cooperatives were willing to sell power to Elbow Lake at wholesale "if Otter Tail would wheel it," "[b]ut Otter Tail refused, relying on provisions in its contracts [with the Bureau and the cooperatives] which barred the use of [Otter Tail's] lines for wheeling power to towns which [Otter Tail] had served at retail." *Id.* The United States sued, complaining that this refusal to deal by Otter Tail violated Sherman Act § 2.[6]

In a sharply-divided 4-3 opinion, this Court affirmed a § 2 judgment against Otter Tail. The bulk of Justice Douglas' opinion for the Court was devoted to rejecting Otter Tail's inter-related arguments that (i) its refusal to deal was immune from antitrust scrutiny by virtue of certain provisions in the Federal Power Act; and (ii) the District Court decree enjoining Otter Tail against refusing to deal impinged upon the Federal Power Commission's authority under the Power Act. *See id.* at 372-77. That opinion was on the other hand so terse in elaborating its Sherman Act § 2 violation theory as to be obscure. *See id.* at 377-79. But Judge Easterbook—yet

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[6] Two other towns (Colman and Aurora, South Dakota) on whose behalf the United States sued "had access to other transmission" in developing their own municipal power systems—leading Otter Tail to "use[ ] the weapon of litigation" against them as a means of squelching that development. 410 U.S. at 371. That litigation conduct on Otter Tail's part raised an entirely separate issue of "*Noerr-Pennington*" antitrust immunity that is irrelevant here. *See id.* at 379-80. A third town (Hankinson, North Dakota) was similarly-situated to Elbow Lake in that it did not have "access to other transmission," but unlike Elbow Lake it acceded to Otter Tail's pressure tactics and renewed Otter Tail's franchise. *See id.* at 371-72. Accordingly, we limit our discussion in text to the dispute between Otter Tail and Elbow Lake.

another of the Seventh Circuit judges with considerable antitrust credentials, *compare supra* pp. 5 & 11—has provided a most cogent gloss:

> [In *Otter Tail*,] [t]here were *three* markets: the market in generation of power, the market in transmission, and the market in retail distribution (like manufacturing, wholesaling, and retailing). Otter Tail held a monopoly of transmission (wholesaling). ***But generation of power is highly competitive***, and many generating firms put their power on the nationwide grid of transmission lines owned by the many electrical utilities. Elbow Lake wanted to shop among the generating firms for the best price. Elbow Lake also may have been hoping that it could distribute power at retail for less than Otter Tail's costs. Otter Tail's refusal to wheel power prevented Elbow Lake from shopping, and thereby had the potential to raise the prices to Elbow Lake's consumers. . . . Otter Tail's transmission prices were regulated; to make a monopoly profit it needed to seize control of an unregulated market, which it did. ***Otter Tail used its bottleneck to prevent Elbow Lake from receiving the benefit of ongoing competition at the generating level.*** [*Fishman v. Estate of Wirtz*, 807 F.2d 520, 571 (7th Cir. 1986) (Easterbrook, J., dissenting) (emphasis added).]

All this being so,

> in *Olympia*, [*supra*,] 797 F.2d at 376-77, in summarizing the point of the essential facility cases [and *Otter Tail* in particular], we said it would be a violation for Western Union to cut off telex service to customers that buy from rival vendors of equipment: ***the equipment market is competitive, unless a firm uses its bottleneck to stamp out that competition.*** [*Id.* at 571.]

Otter Tail thus lends no support whatsoever to Trinko's antitrust claim here. Taken on its own terms, *Otter Tail* holds that it can be a Sherman Act § 2 violation for a monopolist public utility operating in a government-regulated natural monopoly market to refuse to share a facility with or otherwise cooperate with a third party where that refusal impairs competition *in an adjacent workably competitive market*. Thus, while the defendant in *Otter Tail* was, as here, a monopolist public utility, the point of that Sherman Act case was *not* to displace "classical regulation" as the means of policing the utility's natural monopoly market (power transmission), but rather to further the core antitrust law purpose of policing an adjacent workably competitive market (power generation).

In the instant case, Trinko is not invoking the Sherman Act to require Verizon to share its local exchange facilities with AT&T on just, fair and reasonable terms for the purpose of allowing AT&T to compete against Verizon in an adjacent workably competitive market (such as, for example, the telephone equipment market or the long distance market). Rather, Trinko invokes the Sherman Act to require Verizon to share its local exchange facilities with AT&T on just, fair and reasonable terms for the purpose of *restructuring Verizon's government-regulated, natural monopoly local telephone services market*. Policing such a natural monopoly market as such by restructuring it has never been a point or purpose of the antitrust laws, as we have stressed. And nothing in *Otter Tail* states or even fairly suggests otherwise.

B. Although the foregoing is dispositive insofar as the court below's reliance on *Otter Tail* is concerned, we would be remiss if we did not add that *Otter Tail* may merit "reconsider[ation]" in an appropriate case inasmuch as its "theoretical underpinnings" are open to "serious question." *Compare State Oil Co. v. Kahn*, 522 U.S. 3, 21 (1997).

On the one hand, there arguably is a restraint-of-trade common law predicate for the Sherman Act result reached in *Otter Tail*. In *People ex rel. Postal Telegraph Cable Co. v. Hudson River Tel. Co.*, 1887 WL 2590 (N.Y. Sup. 1887), for example, the court invalidated the policy of the defendant local telephone company—which, among other things, oper-

ated a messenger service business—of not allowing "the use of [one of its] telephone[s] by a subscriber for the purpose of calling messengers except from the Central office," *id.* *8, stating:

> The defendant [telephone company] urges that the messenger business as conducted by it is profitable, and for that reason it is desirable that it should be retained as free from [third person] competition as possible; and in aid of its position invokes the rule as established by the courts, that it owes no such duty to its rival as the permission to use its property for the purpose of a competing business, would constitute. The rule cannot be questioned, but the application is faulty. The messenger business, although carried on by the same company and at the same offices, is nevertheless a distinct and separate business, and in no wise essential to the conduct of the defendant's system of transmitting messages by telephone, for which purpose it was incorporated. To extend the rule protecting its business from rivals, so as to include any other business in which it might see fit to engage, could result in great injustice to the public. A livery stable, provision store, meat market, and other classes of business could be added in the course of time, and by amending their rules so as to include each new business in the same manner as the messenger service is now attempted to be protected, a monopoly could be created at the expense of tradesmen and merchants, and to the detriment of the public generally. [*Id.*]

On the other hand, *Otter Tail*'s necessary premise is that the courts through antitrust litigation are equipped to regulate certain discrete aspects of the conduct of a monopolist public utility operating in a government-regulated natural monopoly market (*viz.*, conduct affecting competition in adjacent workably competitive markets) without undermining the duly-considered and duly-authorized policy decisions of the regulators exercising primary jurisdiction over the public

utility industry as a whole—and that premise may well be wrong in certain settings at the very least. As Justice Stewart argued in his *Otter Tail* dissent:

> The Court in this case has followed the District Court into a misapplication of the Sherman Act to a highly regulated, natural-monopoly industry wholly different from those that have given rise to ordinary antitrust principles.
>
> . . . .
>
> With respect to decisions by regulated electric utilities as to whether or not to provide nonretail services, I think that in the absence of horizontal conspiracy, the teaching of the "primary jurisdiction" cases argues for leaving governmental regulation to the [Federal Power] Commission instead of the invariably less sensitive and less specifically expert process of antitrust litigation. . . . This is an area where "sporadic action by federal courts" *can* "work mischief." *Cf. United States v. Radio Corp. of America*, 358 U.S. [334], at 350 [(1959)]. [410 U.S. at 382, 391-92 (Stewart, J., dissenting) (emphasis in original).]

See also Regulation and its Reform, at 285 & 314 ("The extent to which new competition should be allowed in longline telecommunications" markets inextricably linked to "natural monopoly" local telephone services markets "is essentially a *regulatory* problem" rather than an antitrust problem, and "[t]hose who argue automatically for competitive solutions [in this context] may be wrong.") (emphasis in original).

The Court need not enter this thicket here, however, inasmuch as Trinko's sole claim in this case is that Verizon has an antitrust duty to share its local exchange facilities with AT&T to enable AT&T to compete against Verizon *in a government-regulated natural monopoly local telephone services market*. As we have shown, there is no predicate for

recognizing such an antitrust duty in the restraint-of-trade common law that forms the background for the antitrust laws or in the principles or policies of the antitrust laws. And, the policy judgment whether to impose such a duty (and, if so, on what terms) is properly the "classical regulation" domain of Congress and of the Federal Communications Commission, as Congress' regulatory agent, and not the "antitrust" domain of the federal courts applying general Sherman Act provisions designed to police workably competitive markets. *Supra* pp. 7-12.

III.

The court below also intimated that Trinko's antitrust claim is supported by this Court's post-*Otter Tail* decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). *See* Pet. App. at 28a-29a. But *Aspen Skiing* is even further afield than *Otter Tail*—to the point where it arguably cuts against Trinko's claim.

Aspen Skiing involved "the market for downhill skiing services in Aspen, Colorado" and the ski companies operating in that market. 472 U.S. at 587. The market for downhill skiing services in Aspen is *not* a government-regulated natural monopoly market. Indeed, for a substantial period of time three independent companies operated three separate downhill skiing facilities in the Aspen area in competition with one another and on their own unregulated, freely-established business terms. *Id.* at 589.

The *Aspen Skiing* Court made it plain that the rules which govern the conduct of firms seeking to acquire or maintain monopoly power in an unregulated, workably competitive market are not the same as the rules which govern the conduct of monopoly public utility firms operating in a government-regulated natural monopoly market. As we detail, the *Aspen Skiing* Court rejected as inapposite the defendant Ski Co.'s reliance on the general "no [antitrust law] duty to cooperate with business rivals" rule that governs

where the refusal to cooperate is by a monopolist public utility operating in a government-regulated natural monopoly market for the following reason: Ski Co. was operating *in a workably competitive market* in which its competitor Highlands also operated, and it was therefore appropriate to evaluate, under Sherman Act § 2, Ski Co.'s actions toward Highlands that enabled Ski Co. to dominate that market to determine whether those actions were improperly anticompetitive or exclusionary. Thus, *Aspen Skiing* lends no support whatsoever to Trinko's antitrust claim here.

A. The *Aspen Skiing* case arose out of the following sequence of events. In 1962, the "three [then existing] competitors" in the Aspen downhill skiing services market introduced a 3-area, 6-day lift ticket that allowed purchasers to ski the Aspen facility of their choice during each day of a 6-day Aspen ski vacation, with revenues allocated on the basis of usage. 472 U.S. at 589.

In 1964, Ski Co. bought out one of its competitors, but the two remaining competitors (Ski Co. and Highlands) continued to jointly market the 3-area, 6-day ticket on a revenue-sharing basis and "it sold briskly." *Id.*

In 1967, Ski Co. opened a new facility (its third and the area's fourth), at which point the ticket was converted into a 4-area, 6-day ticket. *Id.* For the next ten years, sales of the 4-area, 6-day ticket boomed. *Id.* at 589-91.

But in 1978, Ski Co. proposed a modification to the joint ticket program that Ski Co. knew Highlands could not accept (Highlands didn't), and "a[s] far as Ski Co. was concerned, the all-Aspen ticket was dead." *Id.* at 593. "In its place Ski Co. offered [a] 3-area, 6-day ticket featuring only its mountains." *Id.* And "Ski Co. took additional actions that made it extremely difficult for Highlands to market its own multiarea package to replace the joint offering." [7] As a result,

[7] These actions included refusing to sell daily life tickets to Highlands although Highlands was willing to pay full retail price for those tickets,

"Highlands' share of the market for downhill skiing services in Aspen declined steadily" from 20.5% in 1976-77 to 11% in 1980-81, and "Highlands' revenues from associated skiing services . . . declined sharply as well." *Id.* at 594-95.

B. Highlands sued Ski Co. under Sherman Act § 2, the gravamen of its § 2 case being that Ski Co. had monopolized the market for downhill skiing services in Aspen by its "refus[al] to cooperate" with Highlands in offering Aspen ski vacationers the opportunity to purchase a lift ticket package allowing them to ski both the Ski Co. and the Highlands facilities. *Id.* at 595, 599. Highlands emerged from the district court and the court of appeals with a § 2 judgment in its favor, *id.* at 598-99, and on certiorari this Court affirmed that § 2 judgment.

In so doing, the Court began by making clear that the common law rule that a monopolist public utility operating in a government-regulated natural monopoly market has no duty to facilitate would-be competitors in that market also applies as a general proposition to a firm that has acquired monopoly power in an unregulated, workably competitive market. *See id.* at 600. The Court concluded, however, that the general rule was not a safe harbor for Ski Co., because *in the latter setting* the right of a monopolist to refuse cooperation with its business rivals is not "unqualified," *id.* at 601, and because

> [i]n the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, *the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.* [*Id.* at 603 (emphasis added).]

---

and refusing to accept vouchers issued by Highlands equal to the price of a daily lift ticket at a Ski Co. mountain although the vouchers were guaranteed by funds on deposit in an Aspen bank and were redeemed by Aspen merchants at full value. 472 U.S. at 593-94.

The Court then explained this change and its effects in the following terms:

> The all-Aspen, 6-day ticket with revenues allocated on the basis of usage was first developed when three independent companies operated three different ski mountains in the Aspen area. It continued to provide a desirable option for skiers when the market was enlarged to include four mountains, and when *the character of the market was changed by Ski Co.'s acquisition of monopoly power*. Moreover, since the record discloses that interchangeable tickets are used in other multi-mountain areas *which apparently are competitive*, it seems appropriate to infer that such tickets satisfy consumer demand *in free competitive markets*. [*Id.* at 603 (emphasis added) (citation and footnote omitted).]

Having thus concluded that Ski Co.'s decision "to make an important change in the character of the market," *id.* at 604, precluded Ski Co. from taking safe harbor in the general "no duty to cooperate with business rivals" rule, the Court ruled that whether Ski Co. had violated § 2 depended on whether Ski Co.'s course of conduct taken as a whole could properly be regarded as "anticompetitive" or "exclusionary," *id.* at 604-05. The Court answered that question in the affirmative, *see id.* at 605-11, emphasizing both at the outset and in conclusion that the Court's scope of review was limited given the posture of the case and the normal presumption that juries follow trial court instructions, *see id.* at 604-05, 611.

Given its holding and its rationale, far from supporting Trinko's antitrust claim, *Aspen Skiing* underscores the point that we submit is fatal to that claim—*viz.*, that the office of the antitrust laws is to police workably competitive markets, and not to restructure government-regulated natural monopoly markets.[8]

---

[8] The *Goldwasser* plaintiffs invoked *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912) and *Associated Press v. United States*, 326 U.S. 1 (1945) as support for their antitrust claim parallel to

Trinko's here. *See* 227 F.3d at 401. While the court below did not rely on those decisions in finding Trinko's claim actionable, for the sake of completeness we conclude by noting why neither provides Trinko any comfort.

As a threshold matter, both *Terminal Railroad* and *Associated Press* involved concerted business activity and not unilateral business activity, "a fact that clearly limits their application" to the matter at hand. *See* Areeda & Hovenkamp, *Antitrust Law*, *supra*, ¶ 772d, at 192-95.

Moreover, even on their own terms both decisions are entirely consistent with *Otter Tail*'s and *Aspen Skiing*'s teaching that the Sherman Act polices business activity that prevents or inhibits competition *in workably competitive markets*. Thus, in *Terminal Railroad*, the Court held that the combination of three independent terminal railroad companies then offering three competing means of passage of railroad freight across the Mississippi river at St. Louis into a single terminal railroad company offering only one such means of passage violated the Sherman Act because the effect of that combination was "[t]o close the door to competition" for the provision of passage that previously had existed. 224 U.S. at 398; *see also id.* at 392-93 ("Thus, for a time, there existed three independent methods by which connection was maintained between railroads terminating on either side of the river at St. Louis," and although "[t]his resulted in some cases in an unnecessary duplication of facilities, . . . it at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service."). Similarly, in *Associated Press*, the Court held that the concerted refusal of more than 1,200 newspapers who were members of the Associated Press to admit new members who competed or wished to compete with an existing member violated the Sherman Act because competition in the newspaper publishing market was viable and the concerted refusal was aimed at impeding and ultimately destroying such competition. *See* 326 U.S. at 11-14.

We would add that *Terminal Railroad* and *Associated Press* are of one piece with *Otter Tail* and *Aspen Skiing*—and at a distant remove from the instant case—in a second respect as well. In all four cases, the Court was in a position to evaluate the legality of the defendant(s)' conduct and/or frame a remedial decree based on a prior course of voluntary dealing between the defendant(s) and other persons: in *Otter Tail*, the defendant had in the past "wheeled" wholesale power to towns that it did not serve at retail; in *Aspen Skiing*, the defendant had jointly marketed a multi-area lift ticket with the plaintiff for years on an established revenue-sharing

CONCLUSION

For the foregoing reasons, and the additional reasons set out in Verizon's brief, the judgment below should be reversed.

Respectfully submitted,

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basis; and in both *Terminal Railroad* and *Associated Press*, the defendants set the terms on which favored companies were admitted into the combination found to violate the antitrust laws, thus allowing the court to remedy that violation by the simple expedient of "ordering admission [of non-favored companies] on nondiscriminatory terms," *see* Areeda & Hovenkamp, *Antitrust Law*, at 194. By definition, no such prior course of voluntary dealing exists in the case of a monopolist public utility that operates through its own facilities and that has not made and does not wish to make time share arrangements for use of its operational facilities with aspiring competitors. Accordingly, imposing on such a monopolist an antitrust duty to provide such competitors with access to its operational facilities would, quite improperly, require the courts to assume the quintessential legislative/quasi-legislative role of establishing the terms of that compelled access. *See supra* pp. 10-11.

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VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the antitrust laws. *See, e.g., United States Tobacco Co. v. Conwood Co., cert. denied*, 123 S. Ct. 876 (2003); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003).

WLF is concerned that the decision below would open new frontiers of liability for successful enterprises in a range of industries. WLF files this brief to assist the Court not only in resolving the substantive legal issues presented in this case, but also in understanding the economic and policy implications of the parties' positions. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to reaffirm the basic principle that the antitrust laws do not ordinarily impose affirmative duties to deal, even on monopolists. In recognizing respondent's claims that petitioner had such duties under the antitrust laws, the court of appeals added new obligations to those imposed by Congress' calibrated scheme for regulating the telecommunications industry. The

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of all *amicus* briefs; pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

implications of the Second Circuit's expansive view of the antitrust laws, however, sweep far beyond the context of this and other regulated industries. Using the antitrust laws to compel the sharing of facilities deters, rather than encourages, competition, by effectively ordering a taking of a company's property and creating disincentives for that company and its competitors to make investments in facilities.

The decision below is erroneous on multiple grounds, and should be reversed. At the outset, the court of appeals erred by concluding that respondent has antitrust standing. Under settled principles of proximate causation, only directly injured plaintiffs may bring suit under the Clayton Act. Because petitioner's competitors stand in a better position to pursue respondent's claims than respondent itself, the court below erred by allowing respondent's suit to proceed.

The court of appeals fared no better on the merits of respondent's claims. It first erred by concluding that respondent had stated a viable claim under Section 2 of the Sherman Act on the basis of the "essential facilities" theory. That theory has never been recognized by this Court, and has rightly been the object of widespread criticism. And even if "essential facilities" is a valid theory of liability under the Sherman Act in some circumstances, it certainly is not here, where Congress has imposed an independent duty to deal, and created procedures to establish the terms of such dealing, under a subsequent, industry-specific statute.

Finally, the court of appeals also erred by concluding that respondent had stated a valid Section 2 claim under the "monopoly leveraging" theory. To the extent that that theory has been viewed as providing an independent basis for liability under Section 2 even absent monopolization or attempted monopolization, it has implicitly been abrogated by this Court, and is inapposite in any event where a plaintiff is alleging merely that a defendant failed to supply an *input* to its competitors, rather than using its monopoly in the market for

one distinct product to gain a competitive advantage in the market for another.

ARGUMENT

THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S DISMISSAL OF RESPONDENT'S ANTITRUST CLAIMS.

A. This Court Should Hold That Respondent Lacks Antitrust Standing To Pursue Claims Under The "Essential Facilities" And "Monopoly Leveraging" Theories Against Petitioner.

The Court should resolve this case on the threshold ground that respondent, as a customer of petitioner's competitor, lacks antitrust standing to pursue its claims under the "essential facilities" and "monopoly leveraging" theories. Assuming *arguendo* that those theories provide a basis for liability in this case under Section 2 of the Sherman Act (and, as we will shortly demonstrate, *see infra* Parts B-C, they do not), only AT&T, as the party most directly injured by petitioner's alleged conduct, has standing to pursue such claims. The court of appeals erred by holding that respondent also has standing, and the decision below can be reversed on that basis.

1. Antitrust standing is a prudential doctrine that sweeps more broadly than the jurisdictional doctrine of Article III standing. *See Associated Gen. Contractors of Cal., Inc. v. California Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983) (*AGC*). In order to establish antitrust standing, a plaintiff must demonstrate that he has suffered antitrust injury, defined (somewhat tautologically) as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). That requirement is anchored not only in the language of Section 4 of the Clayton Act, which provides a private right of action only for those plaintiffs injured "by reason of" violations of the

Sherman Act, *see Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 267-68 (1992), but also in background common-law principles of proximate causation, *see id.* at 268-69.

From an economic standpoint, the doctrine of antitrust standing serves three primary purposes, all of which this Court has previously recognized. *See Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 541-44. *First*, it ensures that only those plaintiffs whose injuries are clearly attributable to the antitrust violation, rather than to independent factors, can recover, and thereby protects against overrecovery. *Second*, it frees courts from the often burdensome and speculative task of estimating damages for plaintiffs whose injuries are indirect. *Third*, it protects against overdeterrence, to the extent that directly injured victims can generally be expected to pursue antitrust violators, and obtain treble damages, without indirectly injured victims bringing suit as well.[2]

Perhaps the best-known limitation on antitrust standing is the "indirect purchaser" rule established in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In that case, various governmental entities brought suit against manufacturers of concrete block, claiming that the defendant manufacturers conspired to fix prices in violation of Section 1 of the Sherman Act. *See id.* at 726-27. The plaintiff governmental entities did not purchase concrete block directly from the manufacturers, but instead purchased it indirectly by buying buildings that incorporated the manufacturers' concrete block. *See id.* at 726. Despite the fact that plaintiffs had allegedly paid higher prices as a result of the alleged price fixing, the Court refused to allow their claims to proceed. The Court emphasized that allowing

[2] Indeed, allowing indirectly injured victims to sue could make it more difficult for directly injured victims to settle their claims with antitrust defendants, thereby running the risk of "retard[ing] rather than advanc[ing] antitrust enforcement." *See* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?* 46 U. Chi. L. Rev. 602, 604 (1979).

indirect purchasers to recover would "add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness," *id.* at 737, by requiring courts to "trace the effect of [an] overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer," *id.* at 741. The Court added that barring indirect purchasers from recovery would not significantly disserve the purpose of deterring antitrust violations, since direct purchasers would ordinarily have every incentive to bring suit themselves. *See id.* at 745-46. Allowing indirect purchasers to recover, the Court concluded, would serve only to "carry the compensation principle to its logical extreme." *Id.* at 746.

2. To be sure, respondent's action presents a somewhat different fact pattern than *Illinois Brick*. There, the end consumer suffered the same type of injury as its distributor: namely, higher prices as a result of the manufacturers' alleged price fixing. Here, by contrast, respondent, the end consumer, allegedly suffered consequential losses resulting from petitioner's failure to provide AT&T with sufficient access to its local network — an injury that is arguably conceptually distinct from AT&T's more direct injury, in the form of lost sales and reputational injury, from its inability to sign up and retain local subscribers due to its deficient access.

Even assuming, however, that respondent suffered a conceptually distinct injury, and further assuming that AT&T could not itself recover for that injury (thereby reducing the danger of multiple recovery), the policy justifications behind the antitrust standing doctrine support the same result in this case as in *Illinois Brick*. The mere fact that respondent's injury may be *distinct* does not necessarily render it sufficiently *direct* to establish antitrust standing. *See, e.g., AGC*, 459 U.S. at 540-41 (barring suit by union for conspiracy to coerce businesses to deal with non-union contractors). Indeed, there is even *less* of a justification for allowing suit in this case than in *Illinois Brick*, because respondent, apparently unlike the plaintiffs in *Illinois*

Brick, will not necessarily go uncompensated. Respondent could simply sue AT&T for breach of its express or implied contractual obligation to provide local service of sufficient quality (assuming, of course, that respondent had not waived its right to sue). *See* Richard A. Epstein, *Into the Frying Pan: Standing and Privity Under the Telecommunications Act of 1996 and Beyond*, 5 Colum. Sci. & Tech. L. Rev. (forthcoming 2003), *available at* http://www.manhattan-institute.org/MI_RAE_paper.pdf.

Moreover, allowing respondent's suit is not necessary to serve the underlying goal of deterrence. In fact, AT&T has already sought and obtained relief from petitioner for its alleged misconduct, in the form of a consent decree settling AT&T's administrative complaints. *See* Pet. 5a. Indeed, in most if not all "essential facilities" or "monopoly leveraging" cases, competitors will stand in a far better position to vindicate any injury than end consumers, for much the same reason that direct purchasers in *Illinois Brick* cases stand in a better position than indirect purchasers: namely, their injuries are likely to be larger and easier to establish. *See Illinois Brick*, 431 U.S. at 747. And competitors are usually better positioned to learn of any misconduct than are end consumers. A rule barring respondent's suit is therefore "not likely to leave a significant antitrust violation undetected or unremedied." *AGC*, 459 U.S. at 542.[3]

Ultimately, "[l]ife is too short to pursue every human act to its most remote consequences." *Holmes*, 503 U.S. at 287

[3] In addition, respondent, unlike AT&T, would have to prove causation. *See Holmes*, 503 U.S. at 269. Specifically, respondent would have to prove that the poor quality of its local phone service was attributable to (1) petitioner's failure to provide sufficient access to AT&T, rather than to (2) any failure by AT&T in its provision of services to respondent or (3) any deficiencies in respondent's own telephone system. Even if respondent could prove causation, moreover, similar problems could exist for each member of respondent's proposed class. *See* Epstein, *supra*.

(Scalia, J., concurring in the judgment). If AT&T's millions of customers were allowed to pursue claims under the "essential facilities" and "monopoly leveraging" theories against AT&T's competitors, the requirement of antitrust standing would lose virtually any meaning — to say nothing of the resulting increase in the costs of antitrust litigation. The rule that any plaintiff with a discrete type of injury can sue would work a dramatic expansion of the antitrust standing doctrine, and the Second Circuit's decision on antitrust standing should therefore be reversed.

B. This Court Should Either Refuse To Recognize The "Essential Facilities" Theory, Or Hold That It Does Not Apply In This Case.

The court of appeals also erred in holding that respondent had stated a cognizable claim under the "essential facilities" theory, under which monopolists are required to share certain facilities with their competitors. As a threshold matter, there are good reasons to reject "essential facilities" altogether as a theory of liability under Section 2 of the Sherman Act. At a minimum, however, this Court should hold that respondent does not state a valid claim under that theory here.

1. This Court has never expressly adopted "essential facilities" as a theory for Section 2 liability. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part). At most, this Court's prior Section 2 cases suggest certain narrow exceptions to the baseline rule that Section 2 merely *bars* monopolists from engaging in monopolistic conduct, rather than affirmatively *requiring* them to deal with their competitors.

a. Lower courts have frequently traced the "essential facilities" theory to this Court's decision in *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912). In *Terminal Railroad*, a consortium of railroad companies acquired essentially all of the terminal facilities for trains going

to or from St. Louis. *See id.* at 391-94. The member companies did not build the facilities themselves, but instead merely acquired existing facilities and combined them into a unitary system. *See id.* at 391. To be sure, the Court might well have concluded that these facilities were "essential": indeed, the Court noted that, because of the peculiar topography of the St. Louis area, it would have been prohibitively expensive for a competitor to duplicate the facilities controlled by the consortium. *See id.* at 397. The Court seemed to focus, however, primarily on the fact that the member railroad companies acted as an illegal combination to exclude other railroads. *See, e.g., id.* at 404. The Court ultimately ordered the member railroads not to provide *access* to the facilities to other railroads, but rather to *admit* those railroads to their consortium. *See id.* at 411. In essence, therefore, the Court remedied the monopoly "not by structural relief that would have restored active competition, but by requiring that the existing combination be universal." Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1197 (1999).

b. This Court's decision in *Associated Press v. United States*, 326 U.S. 1 (1945), similarly involved an improper combination of competitors. In *Associated Press*, the Court held that a press agency could not allow existing members to block the admission of competitors, but instead was required to admit newcomers on a nondiscriminatory basis. *See id.* at 21. In so concluding, however, the Court appeared only to find a violation of Section 1 of the Sherman Act, not Section 2. *See, e.g., id.* at 6. The Court did not conclude that the press agency had monopoly power, and in fact expressly refused to conclude that the press agency was a "public utility" that was obligated to deal with all comers. *See id.* at 19; *but see id.* at 28-29 (Frankfurter, J., concurring) (stating that business serving "public interest" has such an obligation). For those reasons, *Associated Press* "fits uncomfortably — if at all — into the

ordinary conception of the essential facilities doctrine." Lipsky & Sidak, *supra*, at 1201.

c. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Court considered a claim that an electric utility violated Section 2 of the Sherman Act by refusing to sell power to, or transfer power for, municipalities that undertook to distribute power at the retail level themselves, rather than allowing the utility to do so. The utility refused to sell power to, or transfer power for, the municipalities even though it was doing so for other customers. *See id.* at 378. Again, the Court might well have concluded that the facilities of the public utility were "essential." In holding that the utility had violated Section 2, however, the Court seemed to rely more on a general conception of monopoly leveraging (namely, that the utility used its "dominance" in the transmission of power to foreclose entry in the retail market) than a more specific notion of essential facilities, as the court below had done. *See, e.g., id.* at 377. Moreover, the public utility not only refused to deal with the municipalities, but also engaged in affirmative misconduct, in the form of sham litigation, *see id.* at 379-80, and anticompetitive contracts with its competitors, *see id.* at 378-79. And while the Court imposed an obligation on the electric utility to deal with municipalities, it was silent on the appropriate *terms* of dealing. *See* Lipsky & Sidak, *supra*, at 1206.

d. Finally, lower courts have frequently cited this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985) as supporting an "essential facilities" theory. In that case, the defendant operated three of the four skiing facilities in Aspen, Colorado; the plaintiff operated the other. *See id.* at 587-90. Plaintiff brought suit after defendant abandoned a joint marketing arrangement, under which the two companies issued joint tickets for their ski areas. *See id.* at 592-93. Defendant then marketed its own multi-day pass, and prevented plaintiff from marketing any sort of multi-area pass

— going so far as to refuse to sell to plaintiff passes to defendant's own ski area, even at the full retail price. *See id.* at 593-95. The Court specifically refused to decide whether plaintiffs could state a claim under an "essential facilities" theory. *See id.* at 611 n.44. Instead, the Court concluded that defendant's conduct was "exclusionary" and constituted an improper refusal to deal, relying heavily on its assessment that defendant "made a deliberate effort to discourage its customers from doing business with [plaintiff]." *Id.* at 610. It is questionable whether the Court's decision in *Aspen Skiing* "stands for any principle that goes beyond its unusual facts." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.). But it is clear that, regardless of whether *Aspen Skiing* would have been an appropriate case for application of an "essential facilities" theory — and, to the extent that it involved only the *termination* of a joint agreement, it arguably was not — the Court did not adopt any such theory in holding the defendant's conduct unlawful.[4]

2. The "essential facilities" theory has been widely criticized as a basis for Section 2 liability, especially in cases involving unilateral conduct. *See, e.g.*, 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772c, at 173 (noting that "essential facilities" theory is "both harmful and unnecessary and should be abandoned"); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L.J. 395, 397, 401 (1986) (concluding that "essential facilities" theory is of "dubious character" and adding that "[i]t is not surprising that the most acute commentary rejects such a notion"); *cf. State Oil Co. v. Khan*, 522 U.S. 3, 16-17 (1997) (citing academic criticism of *per se* rule against vertical maximum price fixing as basis for

[4] From an economic perspective, *Aspen Skiing* is a problematic decision, to the extent that it appears to ignore the *adverse* effects on consumer welfare that may have resulted from the preexisting joint marketing agreement. *See* Lipsky & Sidak, *supra*, at 1211.

abandoning that rule). Indeed, there are good reasons that this Court should dispense with the "essential facilities" theory altogether. The net effect of this theory is to "force firms to share their monopolies" with their rivals, by making critical inputs available to them. By allowing rivals to obtain access to inputs through litigation, however, the theory discourages rivals from developing their own alternative inputs, and deters companies from making investments in the first place in inputs that will ultimately have to be shared with competitors. *See Iowa Utils.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part); *see generally* Adam Thierer & Clyde Wayne Crews Jr., *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism* 9-22 (2003) (contending that compelled sharing results in a taking of property rights and discourages entrepreneurial competition). Indeed, there is good reason to believe that the mere *threat* of compelled sharing has already deterred companies from fully developing their own inputs in similar markets. *See* Thomas W. Hazlett & George Bittlingmayer, *The Political Economy of Cable "Open Access,"* 2003 Stan. Tech. L. Rev. (forthcoming), *available at* http://www.manhattan-institute.org/hazlett/working_01_06.pdf.

To be sure, there may be "limited circumstances" in which the sharing of truly "essential" facilities would be "potentially welfare-enhancing in theory": that is, circumstances in which long-term consumer welfare would be higher as a result of the forced sharing of monopolized inputs than as a result of the development of competing inputs. Lipsky & Sidak, *supra*, at 1223. To the extent that is true, however, the "essential facilities" theory places courts in the difficult position of identifying those few cases in which "mandatory access to the facility will enhance the long-term welfare of consumers, regardless of the effect on individual competitors." Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 Yale L.J. 417, 468-69 (1999).

Even in those cases, moreover, courts will also have the difficult task of deciding "reasonable" prices and terms for such forced access. "[T]he wisdom of judicial regulation of essential facilities requires an assessment of the administrative complexity of the relief proposed." *Id.* at 470. Particularly in cases involving complex and rapidly evolving industries (such as the telecommunications industry), this task should be left to independent regulation by specialized agencies, which are better equipped to design efficient regulatory systems. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, then-J.) (noting that "antitrust courts normally avoid direct price administration"); Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal: Why* Aspen *and* Kodak *Are Misguided*, 68 Antitrust L.J. 659, 661 n.4 (2001) (observing that "[a] judge or jury is not a substitute for a regulatory agency"); Lipsky & Sidak, *supra*, at 1223 (noting that "[t]he salient policy question is whether courts * * * are competent to identify natural monopolies and to formulate and administer regulatory schemes capable of enhancing welfare — a most difficult task even for the best of tailor-made regulatory institutions"). In short, applying the "essential facilities" theory would require courts to "assume the day-to-day controls characteristic of a regulatory agency." Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989).

3. This case provides a singularly poor vehicle for application of an "essential facilities" theory, not only because it would require courts to engage in the complex task of setting "reasonable" terms of access to telecommunications facilities, but also because Congress has already enacted a comprehensive regulatory scheme governing access to such facilities. The Telecommunications Act of 1996 requires incumbent local telephone companies to supply access to their competitors, *see* 47 U.S.C. § 251, and provides a mechanism for the resolution

of disputes when parties are unable to agree on the terms of access, *see* 47 U.S.C. § 252.

If it were indeed true that the antitrust laws impose a duty on local telephone companies to provide local loop access under the "essential facilities" theory, the provisions of the 1996 Act imposing a similar duty would be redundant. *See Cavalier Telephone, LLC v. Verizon Va., Inc.*, No. 02-1337, 2003 WL 21153305, at *11 (4th Cir. May 20, 2003) (noting that "Congress enacted * * * the Telecommunications Act to impose *entirely* new duties, which were in addition to the duties imposed by § 2 of the Sherman Act" and adding that "[Congress] did not intend to have the duties imposed by the Telecommunications Act modify or expand the scope of the Sherman Act"). Moreover, the antitrust laws cannot be read to mandate *terms* of access that may differ from those established under the procedures prescribed by the 1996 Act, since such a reading would contravene the well-established principle of statutory construction that "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (refusing to allow FDA general authority to regulate tobacco under Food, Drug, and Cosmetic Act in light of specific authority granted by subsequent statutes).

For better or worse, the 1996 Act effectively sets terms for access to the local loop. Allowing antitrust liability for failure to comply with those terms would impose potentially crippling liability burdens far beyond those contemplated by the 1996 Act itself. *See Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, then-J.) (noting that "the proper role of antitrust courts is to accommodate the peculiar circumstances under which regulated entities operate"). And allowing antitrust liability for failure to provide access on

different terms would effectively allow judges and juries to override decisions by more experienced regulators, with the result that "[t]he elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 401 (7th Cir. 2000).

In sum, the "essential facilities" theory is unworkable and unwise. At a minimum, if the Court does not definitively foreclose the application of the "essential facilities" theory altogether, it should refuse to apply the theory here.

C. This Court Should Either Refuse To Recognize The "Monopoly Leveraging" Theory As An Independent Basis For Section 2 Liability, Or Hold That It Does Not Apply In This Case.

Finally, the court of appeals erred in holding that respondent had stated a cognizable claim under the "monopoly leveraging" theory. This Court should make clear that "monopoly leveraging" is no longer a viable independent basis for Section 2 liability. Moreover, in the event that the Court decides to resuscitate the "monopoly leveraging" theory, respondent does not state a valid claim under that doctrine, either.

1. The "monopoly leveraging" theory bars monopolists from "leveraging" a monopoly in one market to gain an advantage in another market. The theory appears to have originated from this Court's decision in *United States v. Griffith*, 334 U.S. 100 (1948), in which the Court seemed to suggest that a monopolist in one market could violate Section 2 by engaging in "leveraging" even if no monopoly was threatened in the second market. *See, e.g., id.* at 107 (suggesting that Section 2 prohibits "the use of monopoly power * * * to gain a competitive advantage"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) (same).

However, in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), this Court appeared to foreclose "monopoly leveraging" altogether as an independent basis for Section 2 liability. There, the Court rejected the argument that proof of a mere intent to monopolize could suffice to prove a dangerous probability of monopolization, as is required for a claim of attempted monopolization under Section 2. *See id.* at 459. In so holding, the Court reasoned that Section 2 "makes the conduct of a single firm unlawful *only when it actually monopolizes or dangerously threatens to do so.*" *Id.* (emphasis added). Both before and after *Spectrum Sports*, a number of courts have rejected the "monopoly leveraging" theory. *See, e.g., Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991); *United States v. Microsoft Corp.*, No. 98-1232, 1998 WL 614485, at *26-*27 (D.D.C. Sept. 14, 1998).

The Court's implicit abrogation in *Spectrum Sports* of "monopoly leveraging" as an independent basis for Section 2 liability is entirely logical. Where, for example, a company merely uses monopoly profits from one market to fund efforts to increase market share in another market at the expense of its competitors, consumers suffer no injury, unless the company actually develops a monopoly in the second market (thereby increasing prices or reducing output in the market). *See, e.g., United States v. Western Elec. Co.*, 900 F.2d 283, 296 (D.C. Cir. 1990). Where there is a dangerous probability of monopolization in the second market, a plaintiff can always sue for attempted monopolization; and where a company actually conditions purchase of its product in the second market on purchase of its product in the monopolized first market, a plaintiff can sue for tying even absent a danger of monopolization in the second market. In light of these two protections against predatory conduct by monopolists in other

markets, an independent "monopoly leveraging" theory is superfluous, and should be expressly discarded.

2. In any event, respondent fails to state a valid "monopoly leveraging" claim. One prerequisite of "monopoly leveraging" is a showing of two separate markets. *See, e.g., Berkey Photo*, 603 F.2d at 276. Here, respondent claimed that the first market, over which petitioner allegedly had a monopoly, was the "wholesale market in which it sells access to the local loop to telecommunications carriers," and that the second market was the "retail market in which telecommunications carriers sell local phone services to consumers." Pet. 30a. Even assuming that there is a "market" for access to the local loop — notwithstanding the fact that such a "market" exists only insofar as it is *required* by the 1996 Act — it is clear that there is no distinct *product* as to which petitioner allegedly has a monopoly. To the extent that respondent is claiming that petitioner is using its exclusive access to a particular *input* to gain a competitive advantage in the market for its end product, that claim is really an "essential facilities" claim, not a "monopoly leveraging" claim — and, as we have already demonstrated, *see supra* Part B, respondent cannot allege a valid claim under that doctrine either. Respondent's "monopoly leveraging" claim is simply old wine in a new bottle, and should similarly be discarded.[5]

D. This Court Should Be Cautious About Broad Theories Of Antitrust Liability In Light Of The Dangers Of Meritless And Vexatious Litigation.

There are good reasons that this Court should be especially wary of either expanding the range of plaintiffs that have antitrust standing, or of recognizing broad theories of antitrust liability such as "essential facilities" and "monopoly

[5] Indeed, if the Court were to allow a "monopoly leveraging" claim in these circumstances, it would expose a vertically integrated firm to antitrust liability whenever it has a monopoly in the manufacture of an input, even if it voluntarily offers that input to competitors in the market for its end product.

leveraging." Especially in light of the notice-pleading standards of Fed. R. Civ. P. 8, such claims would ordinarily be easy to plead, thereby enabling antitrust plaintiffs easily to survive the motion-to-dismiss stage and engage in intrusive, disruptive, and costly discovery. With ordinary Section 2 claims, by contrast, courts retain the discretion to insist on "some specificity in pleading before allowing a potentially massive factual controversy to proceed." *AGC*, 459 U.S. at 528 n.17.

Particularly in the antitrust context, in which treble damages are available, unduly allowing claims (especially class-action claims) to proceed beyond the motion-to-dismiss stage will place defendants under intense pressure to settle — even where the underlying claims are meritless and indeed vexatious. *See, e.g., Verizon Del., Inc. v. Covad Communications Co.*, 232 F. Supp. 2d 1066, 1068-69 (N.D. Cal. 2002) (noting allegation that similar lawsuit by competitor of Verizon was based on false factual allegations); Communications Daily, Jan. 30, 2003, at 5 (quoting allegation that AT&T funded similar lawsuit by another competitor of Verizon on ground that "anything that aggravates Verizon is good for AT&T"). Such concerns are particularly acute in the specific context of lawsuits like this one, which can potentially be brought for the purpose not only of recovering antitrust damages, but also of obtaining leverage in contractual negotiations for local-loop access under the 1996 Act. *See, e.g., Cavalier Telephone, LLC v. Verizon Va., Inc.*, No. 3:01CV736, slip op. at 4 (E.D. Va. Nov. 21, 2001) (suggesting leverage as motive for litigation).

By foreclosing lawsuits such as this one, this Court can ensure that the underlying legal theories at issue are not used as vehicles for meritless and vexatious claims. The court of appeals' decision should be reversed, and the lawsuit against petitioner dismissed.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

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VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

BRIEF OF TELECOMMUNICATIONS INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Telecommunications Industry Association ("TIA") is a trade association that represents the interests of approximately 1000 members that manufacture and sell communications equipment. The products manufactured by its members include products that are intended for use by carriers (such as network switches), by business users (such as PBX systems) and by consumers (such as mobile telephones). Collectively, the TIA members have a strong interest in public policies that encourage communications users to increase the intensity of their usage of telecommunications products and communications carriers to increase their output of services and thereby to expand their facilities.

TIA's basic concern is that the "essential facilities" and "monopoly leveraging" rules announced by the Second Circuit in the case below, and which were immediately embraced in dozens of "copycat" cases, will have the exact opposite effect. Faced with such legal uncertainty, incumbent local exchange carriers ("ILECs") such as petitioner will be less likely to invest in new facilities; and new competitive local exchange carriers ("CLECs") also will have less incentive to invest in new facilities.

The reason for this double effect is spelled out in greater detail in Part II.C., below. Suffice it to say here that an ILEC's willingness to invest in new network capacity is

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[1] The parties to this action have filed a blanket consent to the filing of amicus briefs with the Clerk of Court. Pursuant to Rule 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part. No persons other than the amicus curiae, its members or its counsel, have made a monetary contribution to the preparation or submission of this brief.

reduced because of the concern that such an investment will not be justified by future demand for such a capacity. What the Second Circuit's opinion does, however, is to magnify that natural business risk by the legal reality that some antitrust court or jury will compel the ILEC to displace its own communications traffic in order to share its facilities on an uneconomic basis (or award treble damages against it for its failure to do so). Meanwhile, the CLECs are discouraged from investing in new facilities because they have "free rider" opportunities. If they reasonably believe that the Second Circuit's "essential facilities" or "monopoly leveraging" doctrines can and will be used to compel ILECs to share its facilities at below fully allocated cost, they have lower incentive to make an investment in facilities themselves. The net result is likely to be lower demand for communications equipment by carriers in the short run, and lower output of communications services for users in the long run.

Moreover, the uncertainty posed by lawsuits on these grounds will only exacerbate the uncertainty already enveloping the telecommunications industry by the ongoing implementation of the Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56, ("1996 Act") by the Federal Communications Commission ("FCC"). TIA has actively participated in many of the FCC rulemaking proceedings involving the local competition portions of the 1996 Act with a consistent focus on encouraging investment in existing and emerging technologies and promoting facilities-based competition.

INTRODUCTION AND SUMMARY OF ARGUMENT

This private case seeks to piggyback an antitrust remedy on top of a FCC consent decree dealing with the apparent failure of petitioner's predecessor, Bell Atlantic Corporation,

to comply fully with its obligations to share its facilities with CLECs under the 1996 Act. On the day after the FCC order, this case was filed as a class action for treble damages by a customer of one of the CLECs; it alleged in very conclusory terms that Bell Atlantic's failure to comply with its special obligations to provide access under the 1996 Act also constituted a violation of Section 2 of the Sherman Act and that, as a consequence, the plaintiff had received inferior service for which it was entitled to damages. The District Court dismissed the case for failure to state a claim under either the 1996 Act or the Sherman Act, but the Court of Appeals for the Second Circuit reinstated the antitrust complaint based on what it labeled the "essential facilities" and "monopoly leveraging" doctrines.

The 1996 Act's compulsory sharing provisions are exceedingly complex and controversial. The statute requires the FCC, state public service commissions, and mediators to resolve disputes over required access and terms. See generally *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002) *("Verizon")*. It would be the height of folly to stretch Sherman Act jurisprudence beyond its rational basis (as the Second Circuit has done) in order to add a private antitrust remedy on top of such a complicated and specialized regulatory system. This point is underscored by the fact that respondent's case was triggered by an FCC consent order in which Bell Atlantic had agreed to correct a performance glitch in its software, pay $3 million to the U.S. Treasury, and pay $10 million in compensation to affected CLECs, including respondent's supplier.

The Second Circuit decision appears to rest on a finding that Bell Atlantic operated in two markets–a "wholesale" market for network elements that might be provided to CLECs under the 1996 Act, and a "retail" market for local telephone services provided by both petitioner and CLECs.

The court of appeals invoked two arguable antitrust principles as the basis for finding that petitioner's conduct in the "wholesale" market might give rise to a claim by a purchaser in the "retail" market. One is an "essential facilities" theory under which the Court said "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete in a given market." Pet. App. at 29a. The other is a "monopoly leveraging" theory under which petitioner used "monopoly power over a wholesale market . . . to gain competitive advantage in a retail market." Pet. App. at 30a.

Section 2 of the Sherman Act makes single firm conduct illegal if, and only if, it constitutes (i) *monopolization* by excluding actual or potential competitors from the market, or (ii) *attempted monopoly* by predatory means that create a dangerous probability of monopoly. See *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 448 (1993). Both the "essential facilities" and "monopoly leveraging" theories, as articulated by the Second Circuit, go beyond the well-established Section 2 standards by imposing liability on a legitimate monopolist for undertaking activities to "gain competitive advantage." This approach is at fundamental odds with the basic Sherman Act policies that allow any enterprise a broad right to refuse to deal and any monopolist the broad right to compete vigorously and effectively. The Sherman Act, unlike the 1996 Act, does not require any competitor to *affirmatively assist* another competitor.

As explained below, the Second Circuit's articulation of a "monopoly leveraging" doctrine (based on use of monopoly power in one market to gain a *competitive advantage* in another market) ought to be entirely abandoned; and the "essential facilities" doctrine, at a minimum, ought to be

clarified to relate to the *remedies* to be applied where the defendant is monopolizing or attempting to monopolize a particular market. As the Solicitor General explained in his brief in support of certiorari, "an *antitrust* duty to provide such access [only applies where] any refusal to deal was predatory or exclusionary, i.e., that the refusal would not make business sense *unless* it tended to limit or soften competition." SG Br. at 13.

ARGUMENT

I. THE NEED FOR REASONABLY CLEAR AND PREDICTABLE ANTITRUST RULES IN A CAPITAL INTENSIVE NETWORK ENVIRONMENT.

"[E]asy labels do not always provide ready answers" in the antitrust area, as Justice White observed in the Court's landmark decision in *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.,* 441 U.S. 1, 8 (1979). Nowhere has this point been clearer than in the areas labeled "essential facilities" and "monopoly leveraging." Professors Areeda and Hovenkamp make the point precisely in discussing the "essential facility" label:

> '[E]ssential facility' is just a epithet describing the monopolist's situation . . . . It is not an independent tool of analysis but only a label–a label that beguiles some commentators and courts into pronouncing a duty to deal without analyzing the implications already considered at length in this chapter.

IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 772a, at 175 (2d ed. 2002) ("*Antitrust Law*"). This is clearly what happened when the Second Circuit sustained plaintiff's conclusory complaint that its supplier had been denied equal

access to network elements and petitioner had "no valid reason" for its actions.

The legal situation has been complicated by confusion over the exact scope of duties to deal required by this Court's decisions in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (*"Aspen Skiing"*), and *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992). Each placed limits on an alleged monopolist's ability to refuse to deal. Neither employed the "monopoly leveraging" or "essential facilities" labels, and neither involved a large capital intensive market of the type at issue in the present case. But these decisions–especially *Aspen Skiing* – have created some important echoes in the "monopoly leveraging" and "essential facilities" areas. See, e.g., IIIA Areeda & Hovenkamp, *supra* ¶ 772c2, at 186-90 (entitled: *"Aspen: problematic reach and potential limitations"*).

The problem of legal confusion over compulsory access rules is particularly critical where large capital-intensive networks are involved. Investment in such networks requires advance planning and a reasonable expectation that prudent investments will be rewarded. Legal risk is part of the investment equation. Uncertain rules regarding whether, when and on what terms the network operator may have to share a new investment (or pay treble damages for not having done so) are a clear deterrent to making the original investment and maintaining it. See *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999) (Breyer, J. concurring) (*"Iowa Utilities"*); and T. Jorde, G. Sidak and D. Teece, *Innovation, Investment, and Unbundling*, 17 Yale J. Reg. 1, 7 (2000) ("A firm's decision to invest in facilities and innovative activity depends upon its weighing the probability of earning excess return from the investment against the risk of investment loss.").

This case offers this Court a chance to reduce uncertainty in network industries generally and clarify when, if ever, antitrust access requirements should be piled on top of the extensive access and assistance requirements in the 1996 Act.

II. ANY "ESSENTIAL FACILITIES" DOCTRINE MUST BE LIMITED TO EXLUSIONARY OR PREDATORY DENIAL OF ACCESS TO FACILITIES THAT ARE TRULY "ESSENTIAL."

A. The "Essential Facilities" Doctrine, to the Extent that it May Apply outside the Joint Venture Area, is but a Particular Application of Normal Sherman Act Section 2 Rules.

The "essential facilities" concept began with this Court's decision in *United States v. Terminal R.R. Ass'n.*, 224 U.S. 383 (1912). A group of railroads that collectively controlled an extensive and unique set of yard and terminal facilities accessing the trans-Mississippi bridges in St. Louis were denying access to these facilities to certain railroads. Rejecting the Justice Department's recommendation that the terminal be broken up, the Court ordered that membership in the joint venture be granted to all connecting railroads or the facilities use be allowed on a non-discriminatory basis. *Id.* at 411-12. There was apparently adequate capacity to handle additional traffic and a non-discrimination remedy was fairly straightforward. Interestingly the Court emphasized that "one of the fundamental purposes of the [Sherman Act] is to protect, not destroy, rights of property" and new members of the joint venture would have to share the burdens borne by

the original partners as well as the benefits of ownership. *Id.* at 409-12.

The *Terminal Railroad* principle has been invoked in various subsequent joint venture cases under Section 1, but often with less clarity on rationale and less successful results. See, e.g., D. Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?,* 1993 Utah L. Rev. 999, 1025-36 & 1068-72 (discussing *Associated Press v. United States,* 326 U.S. 1 (1945), and its aftermath). But in these joint venture cases, the courts could still fashion a relatively straight-forward remedy of equal access to membership.

The situation is a lot more complicated where the issue is whether to compel access to the facilities of a legitimate monopolist (as is claimed by respondent in this case). Mandating access in such circumstances creates an even greater danger of blunting the monopolist's incentives to invest, innovate, and run its business.

This reality explains why this Court has clearly been more reluctant about compelling something like "essential facilities" access under Section 2 of the Sherman Act where there was a *unilateral* refusal to deal. The Court's closest brush with this issue in the Section 2 context was *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) *("Otter Tail").* Defendant was a dominant regional electric utility which generated power, transmitted it over the only transmission system available, and sold power to retail customers in those areas where it had been granted franchises by the local government. After several local communities declined to renew the defendant's franchises and took over their own electric retail distribution, the defendant refused to supply these communities wholesale power or to "wheel" power to them from other bulk power

suppliers. The Sherman Act § 2 violation was the defendant's effort to eliminate potential competition in the local franchised retail distribution markets by targeting these particular "turncoat" towns, while continuing its normal practice of selling wholesale power and wheeling government power to towns that had long-standing municipal power systems.[2] As the Fourth Circuit just recently explained:

> In *Otter Tail,* the utility *was* in the business of wheeling power and selling electricity at wholesale, and its refusal to engage in such business with municipalities that posed a competitive threat to the utility was found to be an improper maintenance of monopoly power.

Cavalier Tele., LLC v. Verizon Virginia, Inc., Slip Opinion 17 (4th Cir. May 20, 2003) *available at* http://pacer.ca4.uscourts.gov/opinion.pdf/021337.P.pdf ("*Cavalier*"). In *Otter Tail,* the Supreme Court found that, because the Federal Power Commission lacked the statutory authority to compel wheeling, "there is no conflict with the authority of the Federal Power Commission" when "the District Court ordered wheeling to correct anticompetitive and monopolistic practices of Otter Tail." 410 U.S. at 376. In fact, the decree provided that the Commission should set the wheeling rates for the court. *Id.* at 381-82.

The most frequently cited decision on providing an "essential facilities" remedy against a single firm monopolist is *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The lower court

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[2] "The District Court found....that Otter Tail's refusal to sell at wholesale or to wheel power were solely to prevent municipal power systems from eroding its monopolistic position" in local markets. 410 U.S. at 378.

had decided that AT&T had improperly refused MCI's access to the local monopoly networks that AT&T controlled in order to protect its near monopoly of long distance service. This refusal was found by the court of appeals to have "constituted an act of monopolization." *Id.* at 1133. The Seventh Circuit explained that "[s]uch a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another." *Id.* at 1132. In this case, the court ordered AT&T to make this essential facility "available on non-discriminatory terms," noting that "*Otter Tail* provides an analogy to the instant problem." *Id.* at 1132, 1133.

The court articulated four elements that were necessary for an antitrust court to order such an "essential facilities" remedy: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of access to the facility to a competitor; and (4) the feasibility of providing access to the facility. *Id.* This four-part test was about the *remedy* where the defendant was found to have committed an "act of monopolization." Interestingly, the court of appeals rejected MCI's attempt to have AT&T ordered to provide access to its long distance network in order to "fill out" MCI's incomplete system. *Id.* at 1148-49.[3]

Thus the critical question not faced by the Second Circuit is: what kind of a Section 2 violation will give rise to an

[3] "MCI's primary business was to build precisely the type of facilities to which it sought access from the Bell System. There was no sufficient explanation as to why MCI, on the one hand, was building its own network, and, on the other, was entitled to access in the interim to AT&T's facilities." 708 F.2d at 1148.

"essential facilities" type of remedy? Being a monopolist is, of course, not a violation of Section 2. Even under Judge Learned Hand's expansive approach to Section 2 liability, "there must be some 'exclusion' of competitors . . . or . . . some 'unduly' coercive means must be used." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) ("*Alcoa*"). Judge Hand recognized, in oft-quoted language: "The successful competitor, having been urged to compete, must not be turned on when he wins." *Id.* at 430. Rather, such a monopolist is entitled to enjoy the fruits of its "skill, foresight and industry." *Id.* In sum, a monopolist enjoys a broad (but not absolute) right to make commercial choices and "freely to exercise his own independent discretion as to the parties with whom he will deal" under the doctrine in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Because of the risk that Section 2 concerns will chill procompetitive activities by a legitimate monopolist, this Court has made clear that Section 2 only restricts conduct that (a) "actually monopolizes or dangerously threatens to do so," *Spectrum Sports*, 506 U.S. at 459, and (b) cannot be justified as efficiency enhancing or profitable in its own right, *Aspen Skiing*, 472 U.S. at 605-10. This means that a monopolist's refusal to deal only becomes illegal if it cannot be justified economically except as a way of forestalling entry or destroying a competitor. So long as a refusal to deal is more immediately profitable for the monopolist than dealing with a competitor, it should be treated as legitimate under Section 2.[4] This is essentially what the Solicitor General stated in his brief in support of certiorari, "an

[4] "[S]hort-term profitability must be a complete defense" in an "essential facilities" case. III P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 658f, at 131-132 (2d ed. 2002). "As a general matter, a firm is under no obligation to sacrifice its own profits in order to make the overall market larger." *Id.* at 132.

antitrust duty to provide such access [only applies where] any refusal to deal was predatory or exclusionary, i.e., that the refusal would not make business sense *unless* it tended to limit or soften competition." SG Br. at 13. The Solicitor General added that, "exclusionary conduct normally involves the sacrifice of short-term profits or goodwill in order to maintain or obtain long-term monopoly power." *Id.*, citing *Aspen Skiing*, 472 U.S. at 608 & 610-11.

The point is well illustrated by *Otter Tail*. By targeting the towns that had failed to renew their franchise, the defendant was foregoing the same wholesale power and wheeling revenues that it received from other long-standing municipal system customers. See *Cavalier*, Slip Op. at 17. Such an exercise involved sacrifice of short term profits in order to protect its retail monopolies in other town where it had franchises.

By contrast, in the present case, there is no sacrifice of short-term profits. Rather, Bell Atlantic's use of its own facilities for its own services is clearly likely to be more profitable than providing subsidized low-priced access to CLECs under the 1996 Act. While Congress may have decided, in enacting the 1996 Act, that forcing the telecommunications "monopolist" to sacrifice the greater profits that could be earned from operating its own system was in the public interest of promoting competition in the telecommunications sector, there is nothing to suggest that additional liability under Section 2 of the Sherman Act when the monopolist makes the economic rationale decision to deny access was contemplated. Instead, the remedy for such denials was set forth in the 1996 Act.

B. The Extensive Access Obligations Imposed on Incumbent Carriers under the Telecommunications Act of 1996 Cannot be Equated with the More Limited Duties Imposed on a Monopolist under Section 2 of the Sherman Act.

1. The Legal Obligations are Different

The Court is clearly familiar with the breadth and novelty of the compulsory access provisions contained in Sections 251-252 of the 1996 Act from its consideration of the *Iowa Utilities* and *Verizon* cases. ILECs were required to offer CLECs a variety of services and facilities at heavily discounted prices in order to "give aspiring competitors every possible incentive to enter local retail telephone markets." *Verizon*, 535 U.S. at 489. Thus Congress created "something brand new"–which the Court called "the wholesale market for leasing network elements." *Id.* at 528. These obligations, unlike those under the antitrust laws, are triggered simply by being the incumbent carrier, and they are not tied to exclusionary effects or predation.

The Seventh Circuit Court of Appeals recognized this key distinction in rejecting an earlier attempt by a plaintiff to equate 1996 Act obligations with duties under the Sherman Act. *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) (*"Goldwasser"*). As Judge Diane Wood explained for the Court:

> [I]n an effort to jump-start the development of competitive local markets, [Congress] imposed a host of special duties on the ILECs . . . . These are precisely the kinds of affirmative duties to help one's competitors that we have noted do not exist under the unadorned antitrust laws.

Id. at 399-400. The opinion further explained that therefore:

> [a] complaint like this one, which takes the form "X is a monopolist; X didn't help its competitors enter the market so that it could challenge its monopoly; the prices I must pay X are therefore too high" does not state a claim under Section 2.

Id. at 400. Accord, *Cavalier*, Slip Op. at 19 (result dictated by "the special, indeed idiosyncratic, relationship between the Telecommunications Act and the Sherman Act").

This point is both obvious and has been long recognized. Antitrust laws "act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do." S. Breyer, *Regulation and Its Reform* 157 (1982). Thus the judicial remedy in the joint venture type of "essential facilities" cases has been an injunction against enforcement of a discriminatory membership or other rule. See P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 844 (1989); *Compulsory Access*, 1993 Utah L. Rev. at 1117-18. As already noted, the same type anti-discrimination injunction was the basis for relief approved by this Court in *Otter Tail*. By contrast, the access regime under the 1996 Act is about setting, and settling disputes over, prices and terms for use of very specific facilities by CLECs.

2. It Would be Novel and Counter-productive to Use an Antitrust "Essential Facilities" Remedy Where Access is Being Provided and Terms Regulated by Another Regulatory Regime.

Apparently no court has ever tried to invoke an antitrust "essential facilities" rule or remedy where access was being provided under a regulatory statute. Indeed, this Court's important decision in the *Otter Tail* case authorized compulsory access in circumstances where the Federal Power Commission lacked authority to order it. 410 U.S. at 366.

Not allowing the antitrust court and a regulatory agency to impose different access obligations and terms on the same monopolist makes eminent sense, and will reduce uncertainty and opportunism in what is necessarily a sensitive process. Indeed the Court's "primary jurisdiction" cases going all the way back to *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), represent a more sensible balance between the application of regulation and antitrust liability. The case for such restraint by the antitrust court is particularly strong in the telecommunications area because of the complexity of the access arrangements under the 1996 Act. The 1996 Act reflects a balance of the Congressional objectives "to promote competition . . . reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies." 1996 Act, Preamble. Otherwise, as the Seventh Circuit explained:

> The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders

> in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the Section 252 agreements.

Goldwasser, 222 F.3d at 401. The Fourth Circuit has just reached the same conclusion in even stronger terms in *Cavalier* :

> [If] every violation of §§ 251 and 252 of the Telecommunications Act could be asserted as a violation of the Sherman Act merely by alleging that the conduct was undertaken with an intent to monopolize, . . . the procedures and remedies specified by Congress for violations of the Telecommunications Act would become subservient to, indeed overrun by, the Sherman Act . . . . Enforcement under the Sherman Act would effectively collapse enforcement of the Telecommunications Act, leaving only one effective means–the treble damage suit.

Cavalier, Slip Op. at 21. Accordingly, even though there is no antitrust immunity, the "more specific [access] legislation must take precedence over the general antitrust laws, where the two are covering precisely the same field." *Goldwasser,* 222 F.3d at 401.

Such an approach is supported by the fact that the 1996 Act access arrangement is novel, experimental, capable of adjustment and presumably temporary. Antitrust decrees and orders are less capable of adjustment in response to experience, which is probably why Congress terminated the Modified Final Judgment in *United States v. AT&T,*[5] and

[5] 552 F.Supp 131 (D.D.C. 1982) (Modified Final Judgment), *aff'd sub. nom. Maryland v. United States,* 460 U.S. 1001 (1983).

switched detailed regulatory responsibilities from the antitrust court to the FCC. When the FCC finds that "the transitional regulatory regime [under 1996 Act] can be dismantled, [then] the background antitrust laws can move to the fore." *Goldwasser*, 222 F.3d at 402.

3. Rule 12(b)(6) Dismissal of the "Essential Facilities" Claim is Proper

If no "essential facilities" claim under Sherman Act Section 2 is to be allowed in the same area in which access is being provided under another statute, then the respondent's "essential facilities" claim does not present "the kind of question that requires further development of a factual record" and dismissing it under Rule 12(b)(6) is an appropriate course, as in *Goldwasser*. 222 F.3d at 401. See also *Cavalier,* Slip Op. at 22.

It is also a highly desirable course. Having to endure discovery is expensive and disruptive and prolongs the uncertainty faced by petitioner until a summary judgment motion can be briefed and argued in this other pending cases. See *Associated Gen. Contractors v.. California Council of Carpenters,* 459 U.S. 519, 528 n.17 (1983) (justification needed to allow "potentially massive factual controversy to proceed"). The urgency of this point is underscored by the numerous copycat cases that have been filed in the district courts of the Second Circuit alone, since the court of appeals decision in this case.

C. An Expansive Application of an Antitrust "Essential Facilities" Doctrine is Likely to Lead to Under-Investment in Relevant Facilities.

Underinvestment-in telecommunications facilities because of perceived legal risk is a matter of special concern to Amicus Telecommunications Industry Association. TIA strongly believes that prolonged legal uncertainty and multiple antitrust litigations will cause both ILECs and CLECs to reduce their investments in network capacity and capability.[6]

First, there is the issue of the ILECs. Justice Breyer clearly recognized this issue in his concurring opinion in *Iowa Utilities,* where he noted that compulsory sharing:

> may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research or labor; [n]or can one guarantee that firms will undertake the investment necessary to produce complex technical innovations knowing that any competitive advantage derived from those innovations will be dissipated by the sharing requirement.

[6] "Substantial investment in network equipment continues be undertaken by local exchange carriers, although it is quite cyclical." See Telecommunications Industry Ass'n., 2003 Telecommunications Market Review and Forecast at 55 (2003). For example, in 2002, the industry spending on network equipment was still $22.0 billion—less than half of the 2000 figure—but continued growth in annual network equipment spending is projected up to $30.4 billion in 2006. *Id.* The same report also notes that, "the requirement to share equipment with competitors has inhibited ILEC investment and dampened the incentive to market DSL..." *Id.* at 60.

Iowa Utilities, 525 U.S. at 428-29. Justice Breyer was writing about the 1996 Act, but the point applies even more strongly to compulsory access decisions under the Sherman Act, where the results of cases may be even harder to predict, treble damages may be imposed and the injunctive orders may be more long lasting. In sum, the issue boils down to a risk/reward evaluation at the time the incumbent has to make investment choices: the greater the perceived likelihood that the incumbent will have to displace its own traffic and share facilities, the less attractive the investment becomes. See M. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,* 111 Harv. L. Rev. 621, 624 (1998).[7]

Second is the potential effect on the CLECs' investment strategies. To the extent that they can achieve access to an ILEC's system at less than fully allocated cost, they will tend to reduce or at least defer their investment in their own network facilities. The net result is less long-run competition at the level that compulsory access has been ordered. See IIIA Areeda & Hovenkamp, *supra,* ¶ 771b, at 171 ("Forcing a firm to share . . .. discourages [competing] firms from developing their own alternative inputs"). See also *Iowa Utilities,* 525 U.S. at 429 ("[r]ules that force firms to share *every* resource or element of a business would create, not competition, but pervasive regulation . . . .") (Breyer, J., concurring) (emphasis in original).

[7] "Governments can create too many property rights and too many decision-makers who can block use," thus deterring efficient use of property. *Id.* at 625. "Ambiguity [in property rights] may arise because of unresolved conflicts and changing values regarding ownership, such as how far the government may restrict certain uses . . . ." *Id.* at 660.

III. THE SECOND CIRCUIT'S "MONOPOLY LEVERAGING" THEORY SHOULD BE OVERRULED

In addition to holding that respondent had an essential facilities claim against petitioner, the Second Circuit stated the plaintiff "may have a monopoly leveraging claim." Pet. App. at 30a. To sustain this claim, the court said that the plaintiff would have to show that the defendant:

> (1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market; and (3) caused injury by such anticompetitive conduct.

Id., quoting *Virgin Atl. Airways Ltd. v. British Airways PCL*, 257 F.3d 256, 272 (2d Cir. 2001). This approach follows from the Second Circuit's earlier dicta where it had said:

> [T]he use of monopoly power attained in one market to gain a competitive advantage in another is a violation of Section 2, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability.

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

The *Berkey Photo* doctrine is simply incorrect, and this Court should take this opportunity to reject it.

A. "Competitive Advantage" Is Not An Appropriate Basis for Imposing Section 2 liability.

The Court set forth in *Spectrum Sports* a clear, and well accepted, articulation of the scope of Section 2: "Section 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." 506 U.S. 447, 458 (1993). It thus eliminated an aberrant Ninth Circuit line of cases that would allow attempt to monopolize claims without proof of any dangerous probability of success in achieving a monopoly. The Second Circuit's analysis here suffers from the same type of fault: using one's monopoly to "gain a competitive advantage" is neither monopolization nor attempted monopoly; and quite to the contrary, legitimate monopolists are encouraged to compete vigorously and seek competitive advantages based on their own "skill, foresight and industry." *Alcoa*, 148 F.2d at 430.

To the extent that the Second Circuit's approach is drawn from this Court's jurisprudence, it perhaps goes back to some language about "competitive advantage" in *United States v. Griffith*, 334 U.S. 100 (1948).[8] There the defendant movie theater chain was charged with using its monopoly power in some towns to obtain monopolistic prices on films exhibited in towns where there were competing theaters. *Id.* at 108 (films were "licensed on a non-competitive basis on what would otherwise be competitive situations"). Yet *Griffith* is distinguishable from the present case and is not inconsistent with the Court's later *Spectrum Sports* decision.

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[8] Because "the prevention of competition" was illegal under the Sherman Act, it "followed *a fortiori* that the use of monopoly . . . to foreclose competition, to gain a competitive advantage, or destroy a competitor, is unlawful." *Griffith*, 334 U.S. at 107.

Griffith represents a case that could be characterized as the use of monopoly power in one market to attempt to achieve a monopoly in the competitive towns.

In any event, the "monopoly leveraging based on competitive advantage" theory has been largely confined to the Second Circuit Court of Appeals and has been somewhat unevenly applied there. See *Virgin Atl. Airways Ltd.*, 257 F.3d at 272 (use of dominance on some routes to gain competitive advantage on others is illegal). The Federal Circuit and most other Courts of Appeal have generally rejected the *Berkey* type of monopoly leveraging doctrine. See, e.g., *Intergraph Corp. v Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999), and *Fishman v. Estate of Wirtz*, 807 F.2d 520, 541 n.18 (7th Cir. 1986). But there is a lot of continuing litigation and confusion. See 3 Areeda & Hovenkamp, *supra*, ¶¶ 652b (discussing cases), & 652c at 97 ("many leveraging claims are really complaints about the defendant's greater efficiency or aggressiveness, and our unwillingness to turn the antitrust laws into a statute that protects firms from 'unfair' but non-monopolistic practices").

B. As in *Cooperweld*, *State Oil* and *Spectrum Sports*, this Case Offers an Opportunity to Put to Rest an Aberrant Body of Law

Private plaintiffs have every reason to try to squeeze "unfair competition" tort cases into an antitrust mold–thereby gaining automatic trebling of damages and attorneys fees for the successful plaintiff. The "monopoly leveraging" theory espoused by the Second Circuit fits right into this history. It is little more than the source of occasional error, prolonged litigation and considerable confusion.

Having "torts masquerading as antitrust violations" is not new to this Court. It was very much present in the infamous "intra-enterprise conspiracy" doctrine which this Court dispatched to the graveyard in *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752 (1984).. It was also present in the "no dangerous probability of monopoly" doctrine under Section 2 of the Sherman Act, which this Court eliminated in *Spectrum Sports*. And ideas of unfair competition were very central to the "maximum price fixing" doctrine under Section 1, which this Court struck down in *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

The Second Circuit's decision below on "monopoly leveraging" reflects the same kind of spirit. It is infinitely more about protecting *competitors* than promoting *competition*. Accordingly, this Court should dispatch the doctrine, with its inappropriate echoes of *Griffith*, to a quiet grave; and, in so doing, the Court should make clear that a legitimate monopolist violates Section 2 only when it attempts to monopolize a second market by predatory means or takes exclusionary steps to maintain an already existing monopoly in the second market.

If the Court reverses the Second Circuit's decision and eliminates its "monopoly leveraging based on competitive advantage" theory, then there is no remaining basis for plaintiff's complaint. Accordingly, dismissal under Rule 12(b)(6) is the appropriate remedy.

CONCLUSION

The Court of Appeals decision should be reversed.

Respectfully submitted

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No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS INC., PETITIONER

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in reversing the district court's dismissal of respondent's antitrust claims.

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws, and thus a strong interest in the correct application of those laws.

STATEMENT

This case concerns the relationship between the Nation's antitrust laws and the Telecommunications Act of 1996 (1996 Telecommunications Act or 1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. 251 *et seq.*). The 1996 Act requires incumbent local exchange carriers to share their facilities with rivals on certain terms. The question presented concerns whether the antitrust laws impose similar duties.

1. Section 2 of the Sherman Act, 15 U.S.C. 2, makes it unlawful for any firm to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." Section 2 does not specify the elements of monopolization and attempted monopolization. It is nonetheless well established that Section 2 does not prohibit monopoly status in and of itself. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911). Rather, Section 2 makes it unlawful to acquire or maintain monopoly power through predatory or exclusionary conduct. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). That prohibition is most often enforced through negative duties, *i.e.*, by requiring firms to *refrain* from anticompetitive conduct directed against rivals. But in limited circumstances, Section 2 may impose an *affirmative* duty to deal with or assist rivals.

While the antitrust laws provide a general framework for the protection of competition, the 1996 Telecommunications Act imposes detailed duties on certain market participants in order to change the competitive structure of the telecom-

munications industry. See *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 475, 489 (2002). The current structure of that industry is in part a product of the 1982 consent decree that settled the United States' antitrust suit against AT&T. *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). That decree separated AT&T's long-distance and equipment units from the units that provided local telephone service, and barred the latter from providing long-distance telephone service except in limited circumstances. See *Verizon*, 535 U.S. at 475.

Since then, the incumbent local exchange carriers (ILECs), such as the Bell Companies that inherited AT&T's local telephone franchises, have remained dominant in the provision of local telephone service. The 1996 Act seeks to introduce competition into local exchange and related markets by requiring ILECs to assist potential rivals by "sharing their own facilities and services on terms to be agreed upon with new entrants." *Verizon*, 535 U.S. at 476. In addition, the 1996 Act empowered the FCC to "prescribe methods for state commissions to use in setting rates that would subject both incumbents and entrants to the risks and incentives that a competitive market would produce." *Ibid.*

Roughly speaking, new entrants may obtain the use of an incumbent's local telephone network in three ways. First, they may purchase an incumbent's local telephone service at a wholesale rate and resell it. 47 U.S.C. 251(c)(4). Second, they may build their own facilities and "interconnect" them with the incumbent's network. 47 U.S.C. 251(c)(2). And third, they "may choose to lease" some or all of the components of the incumbent's network—known as "network elements"—"which the incumbent has a duty to provide 'on an unbundled basis' at terms that are 'just, reasonable, and nondiscriminatory,'" 47 U.S.C. 252(c)(3). See *Verizon*, 535 U.S. at 491-492; *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act provides that new and incumbent carriers must negotiate critical terms in good faith. *Verizon*,

535 U.S. at 492-493. If they fail to agree, either may seek mediation or arbitration by the public utilities commission of the relevant State. *Ibid.* In furtherance of the goal of "jumpstart[ing]" competition, the 1996 Act provides pricing rules that require incumbents to provide unbundled elements at rates that will "attract new entrants when it would be more efficient to lease than to build or resell." *Id.* at 539. The resulting pricing rules may require ILECs to provide new entrants with access to the local telephone network at rates that are below the ILEC's historical cost. *Id.* at 497-498. The resulting rates may also generate less revenue for the ILEC than would selling to retail customers directly.[1]

The 1996 Act includes an antitrust savings clause, § 601(b), 110 Stat. 143. It declares that, "except as provided" in provisions not relevant here, "nothing in this Act * * * shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. 152 note.

2. This case arises out of a dispute between AT&T, which is a competitive local exchange carrier (CLEC), and petitioner Verizon Communications Inc., an ILEC. The dispute involves petitioner's performance of an agreement with AT&T for telephone service in the State of New York following negotiation and binding arbitration pursuant to 47 U.S.C. 251 and 252. See Pet. App. 5a, 22a; *Order Approving Interconnection Agreement*, Case No. 96-C-0723 (N.Y. Pub. Serv. Comm'n June 13, 1997) (*available in* 1997 WL 410707).

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[1] For example, petitioner asserts that it can earn substantially more by selling its services at retail than it does by leasing facilities at "unbundled network element" rates to competitors. See Pet. Cert. Reply 5 n.5. For present purposes, it is sufficient to observe that the 1996 Act's pricing standards are not designed to ensure that ILECs earn the same revenues selling to competitors as they do by serving retail customers directly. As one competitive local exchange carrier told the FCC, the Act shifts ILECs "from a high margin retail base to lower-margin wholesale business." Letter from Robert A. Curtis, President, Z-Tel Network Services, CC Docket No. 01-338, at 7 (Sept. 23, 2002).

The agreement specifies the terms under which petitioner is to provide AT&T with the use of petitioner's local telephone network so that AT&T can sell local telephone service in competition with petitioner. The agreement also specifies dispute-resolution procedures that are "the exclusive remedy for all disputes between" petitioner and AT&T "arising out of th[e] [a]greement or its breach." Pet. App. 5a (quoting 1997 WL 410707, at *23). On March 9, 2000, the FCC and petitioner entered into a consent decree resolving the FCC's investigation into petitioner's potential violations of Section 271 of the 1996 Act. The decree required that petitioner, among other things, pay $3 million to the United States, and petitioner agreed to pay $10 million to AT&T and other CLECs. Pet. App. 5a, 50a.

One day after the FCC issued the consent decree, respondent filed this putative class action lawsuit. Pet. App. 51a. Respondent is an AT&T customer, *id.* at 5a, but has no apparent business relationship with petitioner. The complaint alleged:

> [Petitioner] has not afforded CLECs access to the local loop on a par with its own access. Among other things, [petitioner] has filled orders of CLEC customers after fulfilling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with [petitioner].

Id. at 6a (quoting J.A. 39 (Am. Compl. ¶ 21)); see J.A. 46-47 (Am. Compl. ¶ 54).

Respondent did not allege in the complaint that petitioner had failed to fill, or had delayed filling, any order relating to its own AT&T local telephone service. Respondent instead alleged that petitioner's conduct had affected its "ability * * * to obtain satisfactory Local Phone Service," and injured

petitioner's competitors "in the provision of" local phone service. J.A. 47 (Am. Compl. ¶ 57). Respondent further alleged that petitioner's conduct "had no valid business reason and was intended to exclude competition * * * 'by making it difficult for competitors to provide service in the Local Phone Service market on the level that [petitioner] is able to provide to its customers in that market.'" Pet. App. 6a-7a (quoting J.A. 46 (Am. Compl. ¶ 52)). Respondent asserted a treble damages claim under Section 2 of the Sherman Act. *Id.* at 6a.[2]

The district court dismissed the complaint. Pet. App. 49a-61a. After holding that respondent had standing under the Sherman Act, *id.* at 53a-54a, the court concluded that the complaint did not state a claim because the only anticompetitive conduct it identified was petitioner's "failure * * * to cooperate with competing local carriers" as required by 47 U.S.C. 251. *Id.* at 53a. "The affirmative duties imposed by the Telecommunications Act," the court observed, "are not coterminous with the duty of a monopolist to refrain from exclusionary practices." *Id.* at 54a.

Respondent amended the complaint, adding allegations that petitioner breached its contracts with CLECs "with the purpose of acquiring or maintaining monopoly power in the local phone service market." Pet. App. 63a. The district court again dismissed the complaint. *Id.* at 64a-68a. The court noted that, under respondent's Sherman Act theory, "when a firm with enough market power" and anticompetitive intent "breache[s] the terms of contracts it has with competitors that assist those competitors," it "violates Section 2 of the Sherman Act." *Id.* at 66a. The antitrust laws, the court observed, do not put monopolists under a general duty to cooperate with competitors. The district court

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[2] Respondent also asserted claims under the Communications Act of 1934, 47 U.S.C. 202, and the 1996 Act. The reformulated question presented does not encompass those claims.

therefore held that the alleged breaches of contract "were not 'anticompetitive' conduct within the meaning of the antitrust laws." *Id.* at 67a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-48a. The court of appeals agreed that respondent had antitrust standing. *Id.* at 26a-27a. The court of appeals disagreed, however, with the district court's holding that respondent's complaint is insufficient to "support an antitrust claim." *Id.* at 29a. Instead, the court held that the complaint "may state a claim under the 'essential facilities' doctrine," under which "a monopolist has a duty to provide competitors with reasonable access to * * * facilities under the monopolist's control and without which one cannot effectively compete in a given market." *Ibid.* Alternatively, the court concluded that respondent "may have a monopoly leveraging claim," which could be established by showing that "the defendant '(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market; and (3) caused injury by such anticompetitive conduct.'" *Id.* at 30a.

SUMMARY OF ARGUMENT

I. Telecommunications firms must comply with both the 1996 Telecommunications Act and the Sherman Act. As the antitrust savings clause in the 1996 Act makes clear, that Act neither restricts the scope of the antitrust laws by conferring implied immunity, nor expands antitrust liability by creating new antitrust duties that did not exist before the 1996 Act's passage.

II. A. Although the court of appeals in form acknowledged the distinction between the 1996 Act and the Sherman Act, in substance it conflated the two. To "jump-start" competition, the 1996 Act requires incumbent local exchange carriers to "share" their facilities with new entrants, offering them access equivalent to the incumbent's, at regulated

rates. But conduct that violates the obligations imposed by the 1996 Act does not *ipso facto* violate the antitrust laws.

To the contrary, unilateral conduct can violate Section 2 of the Sherman Act—it can constitute monopolization or attempted monopolization—only if it is exclusionary or predatory. In the context of an alleged refusal to assist a rival, conduct is exclusionary only if it would not make business or economic sense apart from its tendency to reduce or eliminate competition. That demanding standard is necessary to ensure that the Sherman Act promotes competition. A more generalized duty would rarely enhance consumer welfare and would threaten to impair the competition the antitrust laws are designed to promote.

B. The court of appeals erred in displacing the requirement of exclusionary conduct with the so-called essential facilities doctrine. That doctrine does not establish an independent antitrust tort; it describes certain types of monopolization and attempted monopolization cases. Essential facilities cases, like all other Section 2 cases, require proof of exclusionary conduct.

C. The court of appeals similarly erred in failing to require exclusionary conduct in connection with so-called "monopoly leveraging" claims. The court of appeals' leveraging theory would effectively create a new category of antitrust liability for monopolists that gain a competitive advantage —such as that which results from economies of scope or scale—unless they "share" that advantage with competitors. The Sherman Act prohibits exclusionary conduct that perpetuates or threatens to create monopoly; it does not prohibit failure to share monopoly power.

D. The complaint in this case fails to allege exclusionary conduct and thus fails to state a claim. The complaint does not allege circumstances suggesting that petitioner's failure to assist rivals by providing them with access to its network, on the terms and at the rates required by the 1996 Act, would not make business sense apart from the effect on

competition, the pertinent standard here. For example, it nowhere asserts that, by refusing to sell to competitors as a wholesaler at regulated rates, instead of serving customers itself as a retailer, petitioner undertook a sacrifice of short-term profits that would make sense only if it had the effect of impairing competition. Nor does the complaint address the cost of providing competitors with wholesale access as required by the Act. Contrast *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608, 610-611 (1985) (conduct that imposed a "sacrifice" of "short-run benefits" and made sense only because it "reduc[ed] competition * * * over the long run"); 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 773, at 211 (2d ed. 2002) ("[N]o firm has a general duty to injure itself in order to benefit a rival."). Instead, the complaint rests on the assumption that any conduct that violates the 1996 Act necessarily violates the antitrust laws. Because that assumption is incorrect, and because the complaint fails to allege a sufficient basis for finding the conduct exclusionary, the court of appeals erred in sustaining it.

ARGUMENT

THE 1996 TELECOMMUNICATIONS ACT NEITHER MODIFIES THE SHERMAN ACT NOR ELIMINATES THE REQUIREMENT THAT PLAINTIFFS SHOW EXCLUSIONARY CONDUCT

A straightforward reading of the Telecommunications Act of 1996 and the Sherman Act makes clear that firms in the telecommunications industry must conform their conduct to the requirements of *both* of those Acts, for both Acts apply. The court of appeals correctly so held. The Acts, however, impose distinct requirements, such that a violation of one is not *ipso facto* a violation of the other. While the court of appeals recognized that in form, in substance it applied mistaken antitrust standards that effectively conflate the duties imposed by the two Acts.

The district court dismissed the complaint in this case because respondent failed to allege "exclusionary" practices. The court of appeals did not disagree that the complaint failed to plead such practices. The court of appeals reversed nonetheless because, in its view, Sherman Act liability could be sustained under two alternative theories—"essential facilities" and "monopoly leveraging"—without showing exclusionary conduct. Those theories, however, do not provide stand-alone bases for liability under Section 2, and they do not permit liability absent proof of exclusionary conduct. The Sherman Act prohibits anticompetitive restraints of trade. It is not a license for federal courts to create codes of desirable business conduct under which competitors must assist each other for the public good.

I. The 1996 Act Neither Bars Nor Supports Claims Alleging Sherman Act Violations

The 1996 Act and the Sherman Act implement the national commitment to competitive markets in fundamentally different ways. The 1996 Act was "intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises; [an] objective * * * considered both an end in itself and an important step toward the Act's other goals of boosting competition in broader markets and revising the mandate to provide universal telephone service." *Verizon Communications* v. *FCC*, 535 U.S. 467, 476 (2002). The Act thus sought to "uproot[]" local telephone monopolies, *id.* at 488, and to "reorganize" and "bring competition to local-exchange markets," *id.* at 489, 539, without regard to whether ILEC monopolies developed and persisted lawfully in the first instance. To achieve that end, the 1996 Act provides a detailed blueprint under which ILECs must assist their rivals to "jumpstart" competition. See *id.* at 488. It requires ILECs, for example, to "lease elements of their networks" to their competitors "at rates that would attract new entrants when it would be more efficient to lease than to

build or resell." *Id.* at 539. The resulting "wholesale market for leasing network elements" and resulting pricing structures are "brand new." *Id.* at 528; pp. 1-3 & note 1, *supra*.

Section 2 of the Sherman Act, in contrast, proscribes *conduct* that monopolizes, *i.e.*, monopolization or attempted monopolization. It thus does not prohibit or condemn "monopoly in the concrete." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911)). And it neither expressly mandates the sharing of an incumbent firm's facilities nor provides concrete pricing and access rules for such sharing. That is because, unlike the 1996 Act, the Sherman Act does not impose a generalized duty to assist rivals, much less a generalized duty to assist them by sharing facilities at rates that are "attractive" or on terms different from those offered to non-competitor customers. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-601 (1985); see also *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 375-376 (7th Cir. 1986) (Section 2 imposes on a monopolist "no general duty to help its competitors" and "no duty to extend a helping hand to new entrants"). Simply put, the Sherman Act does not require firms—whether or not monopolists—to sacrifice profits to sell to competitors at a discount. 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 773, at 211 (2d ed. 2002) ("[N]o firm has a general duty to injure itself in order to benefit a rival."); see *id.* ¶ 772, at 188 (*Aspen Skiing* "certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than a monopolistic price.").

Although the two statutes adopt different strategies to promote competition, Congress intended them to coexist. The more specific provisions of the 1996 Act provide detailed obligations that ILECs must meet. But the 1996 Act does not by its terms bar application of the Sherman Act to the same sphere of conduct or provide immunity from Section 2 prosecutions. To the contrary, the 1996 Act includes a savings clause that recognizes that the antitrust laws impose

distinct obligations and that neither set of laws displaces the other. Specifically, the 1996 Act provides (with certain exceptions not applicable here) that it should not "be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. 152 note. Recognizing the import of that language, the decision below correctly held that the 1996 Act does not immunize conduct from antitrust scrutiny. See Pet. App. 32a. The other courts of appeals have uniformly reached the same conclusion. See *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 401 (7th Cir. 2000) (suggestion that the 1996 Act confers "implied immunity on behavior that would otherwise violate the antitrust law * * * would be troublesome at best given the antitrust savings clause in the statute"); *Covad Communications Co.* v. *BellSouth Corp.*, 299 F.3d 1272, 1280-1281 (11th Cir. 2002), petition for cert. pending, No. 02-1423 (filed Mar. 20, 2003); *MetroNet Servs. Corp.* v. *US West Communications*, 325 F.3d 1086, 1099-1101 (9th Cir. 2003); *Cavalier Tel. Co.* v. *Verizon Va., Inc.*, No. 02-1337, 2003 WL 21153305, at *10 (4th Cir. May 20, 2003).

Conversely, the 1996 Act does not expand the scope of the antitrust laws to outlaw conduct that, but for the 1996 Act, would not violate the antitrust laws. Such an expansion of Sherman Act duties would "modify * * * the applicability of * * * the antitrust laws" in contravention of 47 U.S.C. 152 note. Violations of the duties imposed by the 1996 Act are just that—violations of the 1996 Act, subject to the sanctions and penalties imposed by that Act. They do not automatically amount to treble-damages antitrust claims. The courts of appeals are again in accord. Pet. App. 29a; *Covad*, 299 F.3d at 1283 ("[W]e agree with *Goldwasser* that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations."); *Goldwasser*, 222 F.3d at 400 (It is "both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the

antitrust laws."); *Cavalier Tel. Co.*, 2003 WL 21153305, at *11-*12 (similar).[3]

Instead, whether ILEC conduct violates the antitrust laws must be determined according to *antitrust* standards. That is not to say that the presence of regulation is irrelevant. Regulation may affect the economic analysis of an industry, sometimes substantially. Regulation may, for example, render certain business propositions unattractive where, but for regulation, they might be attractive, or vice versa. And regulation might alter likely competitive consequences. As then-Judge Breyer observed in a case concerning a so-called "price squeeze," price regulation "dramatically alters the calculus of antitrust harms and benefits" by "significantly diminish[ing] the likelihood of major economic harm." *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990), cert. denied, 499 U.S. 931 (1991). But regulation does not necessarily eliminate the risk of monopolization; nor does it obviate the need for antitrust analysis. See *id.* at 28 (limiting holding to the "ordinary" case); *Southern Pac. Communications Co.* v. *AT&T*, 740 F.2d 980, 1001 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985).

In all events, the effect of regulation on the incentives for and the economic consequences of particular conduct is highly fact and industry specific. 1A Areeda & Hovenkamp, *supra*, ¶ 240d, at 17-18. The mere existence of a regulatory structure, even the detailed structure established by the

[3] In other contexts not implicated here, courts have sometimes found that the violation of other extrinsic duties—such as prohibitions against fraud and deception—may be a significant factor when ascertaining whether the conduct is exclusionary for antitrust purposes. See ABA Section on Antitrust, *Antitrust Law Developments* 249 (5th ed. 2002) ("where conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws"); *Cavalier*, 2003 WL 21153305, at *13 (holding does not preclude consideration of extrinsic duties outside 1996 Act context); see also pp. 14-15 note 4, *infra*.

1996 Act and the FCC's implementing regulations, does not de facto create antitrust immunity for otherwise anticompetitive conduct. To the extent petitioners contend otherwise, see Pet. 8-9, they are mistaken. But equally important, the 1996 Act does not create an antitrust minefield in which any regulatory violation by a monopolist substitutes for a showing of exclusionary conduct.

II. The Court of Appeals Erred In Failing To Require Exclusionary Conduct Under Section 2 Of The Sherman Act

Although the court of appeals correctly recognized the distinction between the 1996 Act and the Sherman Act as a matter of form, in substance it imported 1996 Act duties into antitrust law. The Sherman Act may require a dominant firm to deal with competitors in limited circumstances. But the court of appeals' decision unduly expands those circumstances by endorsing "essential facilities" and "monopoly leveraging" theories uncabined by the requirement of exclusionary or predatory conduct.

A. Exclusionary Conduct Is Essential To Any Section 2 Claim Premised On Unilateral Action

Section 2 of the Sherman Act specifies two offenses that can be committed by a firm acting unilaterally—monopolization and attempted monopolization. See *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993) (citing *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-769 (1984)). As this Court made clear long ago, Section 2 does not prohibit monopoly as such, *i.e.*, "monopoly in the concrete." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911). Rather, the offense of monopolization is broadly defined as (1) the willful *acquisition or maintenance* of monopoly power (2) by the use of *anticompetitive conduct* "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992) (quoting *United*

States v. *Griffith*, 334 U.S. 100, 107 (1948)); see *United States* v. *ALCOA*, 148 F.2d 416, 432 (2d Cir. 1945).

1. *Monopolization and Attempted Monopolization Require Exclusionary Conduct*

A *sine qua non* for any claim of monopolization or attempted monopolization is conduct that "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." 3 Areeda & Hovenkamp, *supra*, ¶ 651f, at 83-84; *Spectrum Sports*, 506 U.S. at 458-459. Even where actions threaten to create or maintain a monopoly, only "exclusionary" or "predatory" conduct is proscribed by Section 2. *Aspen Skiing*, 472 U.S. at 602. The conduct must "not only (1) tend[] to impair the opportunities of rivals, but also (2) either * * * not further competition on the merits or do[] so in an unnecessarily restrictive way." *Id.* at 605 n.32.

Applying that standard "can be difficult," because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir.) (en banc), cert. denied, 534 U.S. 952 (2001). However, it does not entail open-ended "'balancing' of social gains against competitive harms," for "a firm is under no obligation to sacrifice its own profits" for the public weal. 3 Areeda & Hovenkamp, *supra*, ¶¶ 651a, 658f, at 72, 131-132, 135. Instead, the harm to competition must be disproportionate to consumer benefits (in terms of providing a superior product, for example) and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition). See *ibid.* Under that standard, this Court has recognized a variety of anticompetitive means by which defendants may seek or maintain monopolies.[4]

[4] For example, the enforcement of a fraudulently obtained patent may amount to exclusionary conduct under Section 2 if it has the requisite effect on competition. See *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-178 (1966). Likewise, sham litigation or bad-faith contact with administrative agencies may create a substantial anticompetitive impact in violation of Section 2. See, *e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). And the private standard-setting process may afford opportunities for opportunistic behavior that may harm competition. See, *e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492 (1988).

The requirement of exclusionary conduct emanates from the Sherman Act itself. Imposing liability in the absence of exclusionary conduct risks discouraging, even punishing, the very competition the antitrust laws are intended to encourage. This Court has noted the difficulty of "distinguish[ing] robust competition from conduct with long-run anti-competitive effects." *Copperweld*, 467 U.S. at 767-768. Indeed, the conduct of a vigorous competitor may "appear[] to 'restrain trade' unreasonably" even where that conduct "is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Id.* at 767. Thus, "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Id.* at 775. As Judge Hand wrote, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins." *ALCOA*, 148 F.2d at 430.[5]

2. *In Cases Asserting A Duty To Assist Rivals, Conduct Is Exclusionary Only If It Would Not Make Economic Sense But For The Tendency To Impair Competition*

Where, as here, the plaintiff asserts that the defendant was under a duty *to assist a rival*, the inquiry into whether conduct is "exclusionary" or "predatory" requires a sharper focus. In that context, conduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

[5] Different considerations apply to concerted action, which is "inherently * * * fraught with anticompetitive risk." *Copperweld*, 467 U.S. at 768-769. As a result, concerted action is evaluated for its reasonableness—and is, in some instances, summarily condemned as illegal per se.

This Court has emphasized that sort of analysis with respect to predatory pricing. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588-589 (1986); ABA Section on Antitrust, *Antitrust Law Developments* 247 (5th ed. 2002) ("courts have held conduct to be predatory where it would be economically irrational for the monopolist but for the conduct's adverse impact on competition"). In that context, this Court has expressed concern that conduct perfectly consistent with robust competition—"cutting prices in order to increase business"—should not lightly give rise to antitrust liability, because doing so may "chill the very conduct that antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Price cuts, moreover, rarely harm consumers, because "predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 589.

Likewise, in the context of asserted duties to assist rivals, this Court and the courts of appeals have recognized that conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power. See *Aspen Skiing*, 472 U.S. at 608, 610-611 (conduct that "sacrifice[s] short-run benefits," such as immediate income and consumer goodwill, undertaken because it "reduc[es] competition * * * over the long run"); *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987) (conduct anticompetitive if "its 'anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power.'"); see also *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 523-524 & n.3 (5th Cir. 1999) (conduct exclusionary if it harms the monopolist but is justified because it causes rivals more harm); *Advanced Health-Care Servs.* v. *Radford Cmty. Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990) ("making a short-term sacrifice" that "harm[s] consumers and competition" to further "exclusive, anti-competitive objectives"). In contrast, a refusal to aid rivals that makes economic or business sense *apart* from a tendency to impair competition is not exclusionary.

That demanding standard, like the one employed in the predatory pricing context, reflects the infrequent pro-competitive benefits and the frequent anticompetitive risks posed by a generalized requirement that firms assist rivals. Consumers are generally "no better off when a monopoly is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone." 3A Areeda & Hovenkamp, *supra*, ¶ 771b, at 171-172. At the same time, dealings among rivals create a risk of collusion. *Id.* ¶ 772c4, at 191-192 (discussing "Collusion risks"); see *Aspen Skiing*, 472 U.S. at 598 n.22. That alone renders lawsuits premised on a failure to cooperate with rivals troublesome.

Even in the absence of collusion, dealings among rivals can have the unintended consequence of forestalling rather than promoting competition. A firm that has the right to utilize an input from an incumbent—or that can claim that right through litigation—may have a reduced financial incentive to develop the input itself. 3A Areeda & Hovenkamp, *supra*, ¶ 771b, at 172 ("[T]he right to share * * * discourages firms from developing their own alternative inputs."); *Verizon*, 535 U.S. at 550 (Breyer, J., concurring and dissenting in part) (sharing of facilities is not "consistent with * * * competition," although competition may emerge with respect to elements that are not shared); see *id.* at 551, 560; see also L. Sullivan & W. Grimes, *The Law of Antitrust* § 3.4, at 112 (2000) ("Compelling a monopolist to grant competitors access to a facility that the monopolist has alone developed is problematic" because it "collides with" the "commonplace propositions" that "not even monopolists need give positive assistance to competitors" and "that innovation should be encouraged and rewarded."). Finally, mandated sharing could impose substantial administrative burdens for courts. "Even the simplest kind of compelled sharing * * * means

that someone must oversee the terms and conditions of that sharing." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 428 (2000) (Breyer, J., concurring in part and dissenting in part).

Congress and regulatory agencies, of course, may identify circumstances where it is economically efficient to require the incumbent to share its facilities under a system of price and access regulation; or where new entrants should be permitted to use the monopolist's facilities while establishing themselves, and their customer base, before they are expected to build their own facilities. Indeed, the 1996 Act rests in part on that kind of industry-specific determination. See *Verizon*, 535 U.S. at 510-511 & n.27; *Cavalier Tel. Co.*, 2003 WL 21153305, at *11 (1996 Act a "distinctly different approach to jump-start and accelerate competition"); *Goldwasser*, 222 F.3d at 399 (similar). But the identification and remediation of those situations is best dealt with through industry-specific legislation and regulation—like the 1996 Act—which can be developed by legislative branches and administrative agencies with superior factfinding ability, greater industry expertise, existing capacity for ongoing oversight and refinement, and the public accountability that is an important companion to such economic policy choices. But where, as here, Congress enacts a regulatory structure that imposes affirmative obligations to assist rivals and expressly disclaims any intent to "modify * * * the applicability of any of the antitrust laws," 47 U.S.C. 152 note, it is clearly inappropriate for a court automatically to perceive antitrust consequences from regulatory violations.

Instead, the antitrust laws generally afford all firms—including monopolists—great discretion in determining with whom they will and will not deal. *Aspen Skiing*, 472 U.S. at 600-603. They also permit firms to charge whatever prices they can obtain in the marketplace. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute"), cert. denied, 516 U.S. 1184 (1996); *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) (Breyer, J.) ("even a monopolist is free to exploit whatever market power it may possess" by "charging uncompetitive prices"), cert. denied, 471 U.S. 1029 (1985).

Nonetheless, a monopolist's right to refuse cooperation with rivals is not wholly unqualified. *Aspen Skiing*, 472 U.S. at 600-601. If such a refusal involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition, it is exclusionary and potentially unlawful. In *Aspen Skiing*, for example, this Court upheld a verdict against the Ski Co., which had terminated its former cooperation with a smaller rival, Highlands, and refused numerous proposals for resumed cooperation. In finding sufficient evidence that the Ski Co.'s conduct could "properly be characterized as exclusionary," 472 U.S. at 605, this Court repeatedly stressed that the Ski Co.'s decision to refuse cooperation required the sacrifice of immediate profits. The Ski Co., for example, refused to sell its lift tickets to its rival *at full price*, "forgo[ing] daily ticket sales" and the goodwill of its own customers, who were inconvenienced by that choice. *Id.* at 608; *id.* at 593 & n.14 (Ski Co. refused to sell to its competitor "any lift tickets" of its own, "either at the tour operator's discount or at retail"). The Ski Co. "elected to forgo these short term benefits," the evidence showed, "because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Id.* at 608; see *id.* at 610 (offers rejected by Ski Co. "would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers"); *id.* at 610-611 (Ski Co. "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival"). Moreover, Ski Co. could not satisfactorily

explain how its conduct made economic sense apart from the harm to competition. *Id.* at 608. The conduct was thus condemned because it made no economic sense but for its anti-competitive consequences.

When, on the other hand, a monopolist's refusal to deal (or, as here, breach of an agreement to deal) on particular terms does make business sense apart from exclusionary consequences, antitrust law should avoid interfering with such business choices. At one extreme, a refusal to sell an input to a rival when it requires the incumbent to forfeit profits would make obvious business sense. But even in less extreme circumstances, courts should be hesitant to impose a duty to assist rivals. The decisions of a seller, even a monopolist, regarding to whom it will sell, on what terms, and under what sort of quality and purchaser-satisfaction measures, generally reflect its own assessment of how to compete and provide goods most effectively in the marketplace. There is good reason to be cautious when setting the standard under which such conduct is condemned as exclusionary, lest consumers be deprived of the benefits of pro-competitive business practices, or potential competition be displaced by cooperation as would-be rivals share inputs. See *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); pp. 15-18, *supra*.

B. The Court of Appeals Improperly Applied The "Essential Facilities" Doctrine To Dispense With The Exclusionary Conduct Requirement

Departing from that approach, some courts of appeals have developed an "essential facilities" doctrine divorced from traditional antitrust requirements, including proof of exclusionary conduct. As articulated by those courts, the doctrine requires a monopolist to assist rivals by sharing a facility if, by refusing to do so, the monopolist can "extend monopoly power from one stage of production to another" and the following four elements are found:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Communications Corp. v. *AT&T*, 708 F.2d 1081, 1132-1133 (7th Cir.), cert. denied, 464 U.S. 891 (1983). See 3A Areeda & Hovenkamp, *supra*, ¶ 771a, at 169-170; see also P. Areeda, *The "Essential Facility" Doctrine: An Epithet in Need of Limiting Principles*, 58 Antitrust L. J. 841 (1989).

This Court has never adopted the essential facilities doctrine in a Section 2 case. *Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part). And the doctrine has been heavily criticized. See, *e.g.*, 3A Areeda & Hovenkamp, *supra*, ¶ 771c, at 173 ("the essential facility doctrine is both harmful and unnecessary and should be abandoned"). That criticism is well-founded. Requiring a firm to share its monopoly with its competitors, as the essential facilities doctrine does, can be inconsistent with the fundamental, pro-competitive goals of the antitrust laws. *Id.* ¶ 771b, at 171; see pp. 17-18, *supra*.

The problem, however, is not so much that the four factors articulated by the *MCI* decision are irrelevant; they can be helpful. See p. 22 note 6, *infra*. Rather, the difficulty is that federal courts have sometimes articulated the essential facilities doctrine and the four factors as if they described a stand-alone antitrust violation, untethered to traditional Sherman Act requirements. See 3A Areeda & Hovenkamp, *supra*, ¶ 772, at 175 (doctrine not "an independent tool of analysis but only a label—a label that beguiles some commentators and courts into pronouncing a duty to deal without analyzing the implications"). Section 2, however, prohibits only acts that constitute "monopolization" or "attempts to monopolize." It does not establish essential facilities violations as an independent antitrust tort. The four factors identified in *MCI* and other decisions thus are relevant

but neither necessary nor sufficient to establish Section 2 liability.[6] As one court has explained, the essential facilities doctrine is "a label that may aid in the analysis of a monopoly claim, not a statement of a separate violation of law." *Viacom Int'l, Inc.* v. *Time Inc.*, 785 F. Supp. 371, 376 n.12 (S.D.N.Y. 1992). It relieves plaintiffs "of no burden they would otherwise bear, and constitutes no substitute for a showing that the requirements of a cause of action under the antitrust laws have been met." *Ibid.* Consequently, as with any other monopolization or attempted monopolization claim, so-called essential facilities claims must include some showing of "exclusionary" or "predatory" *conduct*. In this context, that means conduct that would not make sense but for its tendency to reduce or eliminate competition.[7]

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[6] The first two factors—that the facility (1) is controlled by a monopolist, and (2) cannot be duplicated by those seeking to compete in a related market—may help identify circumstances in which a refusal to deal might "reasonably appear capable of making a significant contribution to creating or maintaining monopoly power." 3 Areeda & Hovenkamp, *supra*, ¶ 651f, at 83-84. The fourth requirement in particular—the feasibility of providing the access that was refused—relates to whether the defendant's conduct may be viewed as exclusionary, but does not itself demonstrate it. Cf. *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir.) (feasibility of providing access must be analyzed in the context of the monopolist's normal course of business), cert. denied, 502 U.S. 814 (1991); *MCI*, 708 F.2d at 1133 ("No legitimate business or technical reason was shown for AT&T's denial of the requested interconnection"; "MCI was not requesting preferential access"; MCI was not "asking that AT&T in any way abandon its facilities"); *id.* at 1144 (allegation that AT&T had sold the requested access "to local customers, independent phone companies and other[]" non-competitors "for years").

[7] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), is not to the contrary. *Otter Tail* was not based on an "essential facilities" theory of liability, and the trial court found that the sole reason for the conduct there was to prevent erosion of monopoly power. See *id.* at 378; see also *United States* v. *Otter Tail Power Co.*, 331 F. Supp. 54, 61 (D. Minn. 1971) ("defendant has a monopoly * * * and has consistently refused to deal with municipalities which desired to establish municipally owned systems on the alleged justification that to do so would impair its position of dominance in selling power at retail to towns in its service area"). The defendant, which was already in the business of wheeling power, not only refused to deal, but also demanded and enforced anticompetitive provisions in contracts with potential competitors. 410 U.S. at 378-379.

For that reason, a monopolist's refusal to sell his goods or services below the monopoly price would not ordinarily be actionable, because that price maximizes profits apart from its effect on competitors in related markets. See pp. 18-19, *supra*. Whether that price is above the price set by regulators or higher than the would-be competitor is willing to pay is irrelevant. *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir.) (rejecting view that essential facilities doctrine requires that access be provided to a monopolist's competitor on terms that would permit the competitor to make a profit), cert. denied, 502 U.S. 814 (1991). Indeed, the contrary rule would not merely require the monopolist to share its facility. It would, in effect, require the monopolist to share its profits.[8]

In this case, the court of appeals focused on the existence of a so-called essential facility and lost sight of the need for exclusionary conduct. It thus treated the essential facilities doctrine as a free-standing basis for Sherman Act liability, on a par with monopolization and attempted monopolization, but without examining the standards applicable to those offenses. In particular, the court of appeals deemed it sufficient that the complaint alleged that the local loop was es-

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[8] For that reason—and because of the difficulties inherent in determining the price and other terms a non-exclusionary monopolist would demand—the circumstance most likely to lead to liability is "a monopoly supplier's *discriminating* against a customer because the customer has decided to compete with it." *Olympia Equip.*, 797 F.2d at 377 (emphasis added). The monopolist's willingness to offer non-competitors particular terms is evidence that those terms are profitable to it, and that the refusal to offer the same terms to competitors represents a sacrifice of immediate profits that would not make sense but for the tendency to impair competition. Judge Posner has therefore described such discrimination as the "essential feature of the refusal-to-deal cases." *Ibid.*

sential to competing in the local phone service market; that recreating the local loop was prohibitively expensive; and that petitioner denied AT&T, a competitor, "reasonable access" to the loop. Pet. App. 29a-30a.

The court of appeals contemplated that petitioner might eventually escape liability if it established either that the local loop was in fact not essential, or that it actually had provided "reasonable access." Pet. App. 30a. But the court did not address whether the complaint alleged exclusionary or predatory conduct. Furthermore, it appears to have assumed that "reasonable access" means access on the terms provided under the 1996 Telecommunications Act rather than access on such terms as would make business sense apart from their effect on competition, such as those offered to non-competitor customers.[9] That inappropriately imports Telecommunications Act duties and standards into the antitrust laws, violating the 1996 Act's instruction that "nothing

[9] The court of appeals interpreted the essential facilities doctrine to require that access be provided on "just and reasonable terms" placing all—apparently including the monopoly supplier of the facility—on an "equal plane." Pet. App. 29a. That language, however, is not drawn from standards relating to antitrust liability but from the remedial requirements this Court addressed in *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912). See *Southern Pac. Communications Corp.*, 740 F.2d at 1008-1009; *United States* v. *AT&T*, 524 F. Supp. 1336, 1352-1353 (D.D.C. 1981). *Terminal Railroad*, moreover, was not based on an essential facilities theory of liability. That case concerned whether "unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade." 224 U.S. at 394. Nor was a denial of access at issue there, since the fact "[t]hat other companies are permitted to use the facilities of the Terminal Company upon paying the same charges paid by the proprietary companies seem[ed] to be conceded." *Id.* at 400. The Court chose to impose a requirement of equal access on reasonable terms as part of a remedial scheme because it found that dissolving the combination would be injurious to the public. *Id.* at 409-411; *Associated Press* v. *United States*, 326 U.S. 1, 25 (1945) (Douglas, J., concurring) (*Terminal Railroad* "held that as an alternative to dissolution a plan should be submitted which provided for equality of treatment of all railroads.").

in" it "shall be construed to modify * * * the applicability of any of the antitrust laws." 47 U.S.C. 152 note. By equating the specific regulatory duties of affirmative assistance imposed by the 1996 Act with conduct required to avoid Sherman Act liability, the court misconceived the distinct purpose of the 1996 Act.[10] That Act's requirements reflect a variety of regulatory objectives. The specific duty to assist competitors by leasing access to the local loop was not designed merely to protect competition, but to restructure an entire industry by, among other things, encouraging new entry; consequently, the Act in some circumstances imposes duties to assist rivals on terms that are more favorable than would be offered by a profit-maximizing monopolist not engaged in predatory or exclusionary conduct. The failure to fulfill those specific 1996 Act duties (or to dedicate sufficient resources to their fulfillment) may amount to a regulatory violation without *ipso facto* violating the antitrust laws.[11]

C. The Court Of Appeals' Application Of "Monopoly Leveraging" Is Inconsistent With Section 2 Principles

The court of appeals' articulation of its second theory of Section 2 liability—monopoly leveraging—similarly countenances an antitrust violation unsupported by fundamental antitrust principles. The phrase "monopoly leveraging" is often employed to describe the use of power in one market to affect competition in a second, related market. In this case,

[10] As we have observed (p. 12 note 3, *supra*), in other contexts, violation of extrinsic statutory or legal duties may be significant in determining whether conduct is exclusionary for antitrust purposes.

[11] Even if the 1996 Act is merely viewed as a legislative remedy to deal with the competitive challenge posed by a monopolist's control of the "essential facility" of the local loop, it does not follow that a regulatory violation always amounts to an antitrust violation. Indeed, even a violation of a court order requiring non-discriminatory access to a particular facility, see p. 24 note 9, *supra*, would not without more constitute an independent antitrust violation, even though it might be a basis for contempt.

the court of appeals held that a "monopoly leveraging" violation is established if a monopolist in one market uses its monopoly to "gain a competitive advantage" in a second market, Pet. App. 30a, even if the monopolist does not have "a dangerous probability" of successfully monopolizing the second market, *id.* at 31a n.13. That formulation is difficult to reconcile with the text of the Sherman Act, which proscribes monopolization and attempted monopolization, rather than "misuse" of market power. 3 Areeda & Hovenkamp, *supra*, ¶ 652a, at 89. It is also inconsistent with *Spectrum Sports*, 506 U.S. at 459, which clarifies that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[12]

Moreover, the Second Circuit's "monopoly leveraging" formulation suffers from the same defect as its "essential facilities" holding—it does not require the monopolist's conduct to be "exclusionary" or "predatory" within the meaning of Section 2 jurisprudence. The court of appeals identified only one conduct element of the leveraging violation alleged here, the "use" of monopoly power in one market. Pet. App. 31a. But use of monopoly power is not unlawful; predatory or exclusionary conduct to create or maintain a monopoly is. The court of appeals failed to recognize that distinction.[13]

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[12] The Second Circuit has elsewhere acknowledged that tension. See *Virgin Atl. Airways Ltd.* v. *British Airways PLC*, 257 F.3d 256, 272 (2001) (*Spectrum Sports* creates "uncertainty * * * as to the continued scope of a monopoly leveraging claim as an independent cause of action."). The court of appeals' use of a "competitive advantage" formulation may not matter in this case, because the complaint may sufficiently allege a dangerous probability of successful monopolization.

[13] The court of appeals appears to have considered the use of monopoly power in a monopoly leveraging claim to be "anticompetitive or predatory conduct" per se, Pet. App. 31a n.13, perhaps as a matter of definition. But the court never explained why petitioner's or any other monopolist's use of monopoly power to gain a competitive advantage in a second market would always be economically irrational except insofar as it tended to eliminate or lessen competition. The Second Circuit appears to have derived its monopoly leveraging formulation from *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), by way of *Berkey Photo*, 603 F.2d at 275. *Griffith* declared it "unlawful" to use "monopoly power, however lawfully acquired, * * * to gain a competitive advantage," and *Berkey Photo* stated that "a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another." But the court of appeals took the *Griffith* language out of context. *Griffith* concerned the alleged use of monopoly power to extract "exclusive privileges" that "unreasonably restrained competition"; it was the extraction of privileges that was found problematic. 334 U.S. at 103-104. Moreover, *Berkey Photo* nowhere suggests that a monopolist in one market may not lawfully benefit from that monopoly when competing in a second market. See 603 F.2d at 276 (noting that "an integrated business" does not "offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market").

The court of appeals' test for monopoly leveraging would, like its essential facilities formulation, also condemn non-exclusionary conduct that neither creates nor sustains monopoly power. It would, in essence, create a new category of antitrust liability, applicable to monopolists that gain any competitive advantage—such as that which results from economies of scope or scale, or the ability to sustain expensive research and development efforts—in their activities in competitive markets unless they "share" that advantage with competitors. Such a theory is incompatible with the antitrust laws. What offends the Sherman Act is not the use of monopoly power as such, but exclusionary techniques. Here, petitioner is alleged to have breached contractual and regulatory requirements under the 1996 Act that it provide CLECs with access to its facilities on specified terms. Unless that conduct would not make economic sense apart from a tendency to impair or forestall competition, it is not exclusionary and is not actionable under Section 2.

D. Under The Proper Standards Of Section 2 Liability, Respondent's Complaint Fails To State A Claim

The Federal Rules require only that a complaint include "a short and plain statement of the claim showing that the

pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), a statement that need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Swierkiewicz* v. *Sorema*, 534 U.S. 506, 512 (2002) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)). Even when evaluated by the liberal notice pleading standards of the Federal Rules of Civil Procedure, respondent's complaint fails to state a claim for relief under Section 2 of the Sherman Act, because it fails to allege exclusionary conduct.

The gravamen of respondent's claim is that, by failing to fill its competitors' orders in a timely fashion, petitioner failed to provide them with full and nondiscriminatory access to its local telephone network so as to permit them to use that network in competition with petitioner's own use of it. See J.A. 39, 46-47 (Am. Compl. ¶¶ 21, 54); p. 4, *supra*. Respondent's complaint does not implicate an antitrust duty to provide such access, because the complaint does not allege that any refusal to deal was predatory or exclusionary in the sense relevant here, *i.e.*, that the refusal would not make business sense unless it tended to eliminate or lessen competition. Contrast *Aspen Skiing*, 472 U.S. at 608, 610-611; pp. 15-17, 19-20, *supra*. The complaint makes no allegations whatsoever relating to price, profitability, or the costs of complying with 1996 Act access requirements. It thus nowhere suggests that petitioner's failure to comply—or failure to devote sufficient resources to achieve any particular level of compliance—would make no economic sense apart from the tendency to impair competition.

That omission is no mere drafting oversight. The district court dismissed respondent's initial complaint for failure to allege facts establishing "any 'willful acquisition or maintenance' of monopoly power," Pet. App. 55a—that is, for failure to allege exclusionary or anticompetitive conduct. After seeking and receiving permission to replead, *id.* at 62a, respondent filed an Amended Complaint, which the district court also dismissed for failure "to allege any anticompetitive conduct." *Id.* at 67a. Respondent's failure to allege exclusionary conduct even after having been put on notice of the need to allege it is reason enough to conclude that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). Notice pleading may not require that a complaint "include evidentiary detail. On the other hand, the price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome." *DM Research, Inc.* v. *College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (Boudin, J.). Respondent's two successive failures to allege such a factual predicate show that it cannot pay the price of entry.

The complaint does allege that petitioner "had no valid business reason" for the challenged conduct, Pet. App. 6a (quoting J.A. 47 (Am. Compl. ¶ 57)), and that petitioner "has engaged in exclusionary and anticompetitive behavior," J.A. 46 (Am. Compl. ¶ 52). But those conclusory assertions are not sufficient allegations that the conduct was exclusionary—in the context of failure to assist a rival, that the conduct would not make economic sense apart from an effort to restrain competition. See *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986) (court not "bound to accept as true a legal conclusion couched as a factual allegation"). The court of appeals, moreover, did not refer to either allegation in its antitrust analysis. See also *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174, 180 (2d Cir. 1990) (treating conduct that makes business sense as illegitimate).

Ultimately, the complaint must be dismissed because it rests on the unstated and incorrect assumption that the antitrust laws require a monopolist—either through the "essential facilities" or "monopoly leveraging" doctrines—to assist competitors by acting as a wholesaler, offering them access to the incumbent's facilities equivalent to that which the incumbent gives itself on terms not offered to non-competitor

customers. The 1996 Act, as implemented by FCC regulations upheld by this Court in *Verizon* v. *FCC*, *supra*, does impose those requirements. See 535 U.S. at 539; Pet. App. 5a (under 47 U.S.C. 251(c), ILECs must provide competitors access "at least equal in quality to that provided by the local exchange carrier to itself"). But, as the Seventh Circuit recognized in *Goldwasser*, "the duties the 1996 Act imposes" are not "coterminous with the duty of a monopolist to refrain from exclusionary practices." 222 F.3d at 399; see also 47 U.S.C. 152 note (Act does not "modify * * * the applicability of any of the antitrust laws."). Respondent has not alleged an exclusionary refusal, apparently because respondent believed that an allegation of a regulatory violation of the 1996 Telecommunications Act suffices. But not every violation of the 1996 Act constitutes exclusionary or predatory conduct under the antitrust laws. Nor, contrary to the decision below, does the allegation that the monopolist owns an essential facility or employs a facility to leverage market power substitute for allegations of predatory conduct. To permit this case to go forward under the Second Circuit's erroneous construction of Section 2 would fundamentally transform the Sherman Act so as to require monopolists to pull their competitive punches, assist their competitors, convert themselves from retailers into wholesalers, and share monopoly profits on demand. That is not conduct the Sherman Act requires.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF AMICI CURIAE[1]

Consumers Union, publisher of *Consumer Reports* magazine, is a non-profit, independent testing and consumer protection organization serving only consumers. Since 1936, Consumers Union has been a comprehensive source for unbiased reporting about goods, services, health, personal finance, and other consumer concerns. The organization is funded solely from the sale of *Consumer Reports* (in print and online) and other services, and from nonrestrictive, noncommercial contributions, grants, and fees.

Consumers Union engages regularly in consumer advocacy before the executive, judicial, and legislative branches of government. Consumers Union is committed to securing for consumers the benefits that inure from competitive telecommunications markets, especially lower prices and improved quality of service.

The Consumer Federation of America (CFA) counts among its members more than 285 consumer advocacy and education organizations throughout the nation with a combined membership exceeding 50 million people. CFA disseminates information on consumer issues, provides support to national, state, and local organizations committed to consumer advocacy and education, and conducts policy studies that examine aspects of the marketplace and their consumer impacts. CFA works as an advocate for pro-consumer policy before federal and state legislatures and regulatory agencies, and the courts. The breadth of CFA's membership enables CFA to speak for virtually all consumers on decisions that affect their lives.

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. In letters filed with the Clerk of the Court, the parties have consented to the filing of all amicus briefs.

CFA has consistently advocated policies and programs that help ensure, among other things, a marketplace with vigorous competition and adequate consumer redress. An important area of focus for CFA has been utilities. To advance the interests of consumers, CFA has advocated greater competition in telephone, electric, and natural gas markets while seeking to ensure that consumers share in the benefits of this competition.

Consumers Union and CFA respectfully submit this brief *amicus curiae* because a proper, pro-consumer application of the antitrust laws is particularly important in the telecommunications industry. Competitive conditions in this industry touch virtually every consumer. We believe that vigorous, beneficial competition can most likely be achieved by adhering to the congressional design of allowing regulation and antitrust enforcement to complement each other, and by interpreting the antitrust laws as intended by Congress with the welfare of consumers as the principal policy objective. Consumers Union and CFA also regard it as vital that consumers, who are often the immediate focus and always the ultimate victims of anticompetitive conduct, have standing to vindicate their rights under the antitrust laws.

SUMMARY OF ARGUMENT

In this case, Petitioner seeks a radical narrowing of Section 2 of the Sherman Act, virtual immunity from antitrust scrutiny of its commercial dealings with rivals who threaten its monopoly of local telephone service, and protection from antitrust challenges by the very consumers whose economic welfare is the Sherman Act's primary goal. Those results are unwarranted, and the Court should affirm the judgment of the Court of Appeals reinstating Respondent's Complaint.

The Court should affirm regardless of any decision it might make on the issues of monopolization law that Petitioner and supporting *amici* have raised. Petitioner and *amici* restrict their focus to the requirements for proving that a monopolist's conduct is illegally exclusionary and the validity of the court of appeals' articulation of the monopoly leveraging doctrine. The question before the Court, however, is whether Respondent's Complaint states a valid claim. It does. The Complaint alleges all that is necessary to establish a violation of Section 2 of the Sherman Act, including allegations that Verizon's conduct was exclusionary and that Verizon has monopoly power in the relevant market.

A court may not dismiss a complaint unless under its allegations there is no conceivable set of facts that plaintiff could prove to establish a right to relief. The Complaint charges Verizon with monopolization. No one challenges the adequacy of Trinko's allegation that Verizon has monopoly power in the relevant market, the first element of the offense. Rather, Petitioner and *amici* address the standards for determining whether a monopolist's conduct is "exclusionary" by challenging the court of appeals' decision as it relates to refusals to deal and the essential facility doctrine.

Lost in the argument about essential facilities and refusals to deal, however, is the fact that the Complaint in this action sufficiently alleges illegal conduct by Verizon. In addition to an explicit allegation of exclusionary conduct, the Complaint includes other allegations that if proven would establish that Verizon's conduct was illegal, and makes particular factual allegations describing the exclusionary nature of the conduct. The United States asserts that the Complaint is deficient. Any such effort to color this matter as a true controversy must fail, since the Complaint far exceeds the standards required under the Federal Rules of Civil Procedure. However the Court might decide the antitrust

issues Petitioner and *amici* have raised, the result will be the same: the court of appeals' reinstatement of Trinko's Complaint will be affirmed.

A monopolist's conduct is exclusionary when it harms consumers and competition. The limited approach of restricting exclusionary conduct to that which makes no business sense apart from its tendency to create monopoly returns loses sight of the consumer welfare purpose at the heart of the Sherman Act in favor of a focus on the defendant's business. Effects on competition and consumers of the type alleged in the Complaint cannot be ignored simply because the defendant's conduct might have led to some business benefit, however slight.

The Court should also reject the call to deem refusals to deal illegal only when the defendant refuses to provide a competitor exactly what it is providing to others, on exactly the same terms. Such a rule would create a perverse incentive: a monopolist might choose never to share with competitors simply to avoid liability. In addition, creation of that rule would be inconsistent with the Court's general unwillingness to fashion special rules for Sherman Act cases, preferring instead to allow cases to be decided on their facts.

The essential facilities doctrine is a useful method for identifying exclusionary conduct, but this case is not an appropriate occasion for the Court to consider the validity or contours of the doctrine. The doctrine has been widely adopted by the lower courts, and, contrary to Verizon's suggestion, enjoys robust support in precedent. For the reasons summarized above, the doctrine should not be limited by the requirement that the refusal to provide a facility make "no business sense" apart from its capacity to enhance monopoly power.

This case is not an appropriate vehicle for considering the essential facilities doctrine. As discussed above, the Complaint sufficiently alleges illegal monopolization without reference to anyone's version of the doctrine. A ruling on the doctrine, moreover, would not have the benefit of a full record. Finally, there is little reason to believe that the courts' application of the doctrine has led to any of the dire results that its critics attribute to it.

Regulation under the Telecommunications Act of 1996 cannot justify *de facto* antitrust immunity for conduct in areas touched by that Act. The arguments offered to reach just that result have repeatedly been rejected when cast as arguments for explicit antitrust immunity. There is no factual basis for the *de facto* immunity sought here – only suppositions that regulation under the Act will work so perfectly that there is no role for the antitrust laws, and that antitrust enforcement will interfere unduly with that regulation. These suppositions are flatly inconsistent with the congressional design, which was to couple antitrust scrutiny with regulation under the 1996 Act. There is no reason to depart from the established method of determining the antitrust significance of regulation: by considering its impact in particular cases, and on the basis of facts, not supposition.

Respondent has standing to maintain this action. It is not disputed that the Complaint alleges injury-in-fact that constituted antitrust injury. In addition, the alleged injury is sufficiently direct to justify antirust standing, does not raise significant issues of apportionment or double recovery of damages, and is of a type that makes Trinko a suitable antitrust plaintiff.

Respondent is the immediate victim of the alleged conduct by Verizon. The effect on Trinko alleged in the complaint was an inevitable result of Verizon's actions, with no "chain of causation," because Verizon's local service

competitors had no alternative to dealing with Verizon and visiting on consumers the injuries that Verizon's conduct allegedly caused. In addition, the injury to plaintiff was "inextricably intertwined" with the injury to affected competitors. Plaintiff is a consumer in the market directly affected by the alleged conduct, and was thus directly disserved by the lessening of competition in that market. Finally, Trinko's injuries were a foreseeable and proximate result of the illegal conduct.

Respondent's claims will not lead to duplicative recovery or problems with the apportionment of damages. Trinko's injury – poor telephone service from competitive carriers – is distinct from those of the competitors, which will focus on lost competitive opportunities. In addition, this case does not involve any prospect of "passing on" that will complicate the task of ascertaining damages.

Consumers in Trinko's position have strong incentives to identify and prevent anticompetitive conduct by telephone monopolists. They face the Hobson's choice of choosing degraded service from competitors or dealing with an established monopolist. Disadvantaged competitors, moreover, cannot necessarily be counted on to vindicate the public interest in antitrust enforcement. Their incentive to pursue antitrust challenges like this is tempered by the knowledge that they depend on and must deal on a day-to-day basis with a powerful prospective defendant.

For all these reasons, the Court should affirm the judgment of the court of appeals.

ARGUMENT

I. THE COMPLAINT ALLEGES ALL THE ELEMENTS OF MONOPOLIZATION, INCLUDING EXCLUSIONARY CONDUCT

In this case the Court will determine whether dismissal is proper because the Complaint fails to state a claim upon which relief can be granted. Verizon proposes antitrust standards to be applied in making that determination, but its argument never once refers to the Complaint. This is understandable, because however the Court might resolve the issues Verizon raises, the Complaint states a valid claim of monopolization. The Court is really being asked, therefore, to affirm the decision of the Court of Appeals and return the matter to the lower courts with an advisory opinion on the law of monopolization. The Department of Justice and the Federal Trade Commission have in essence acknowledged that possibility. On Petition for a Writ of Certiorari to the United States District Court for the Second Circuit, *Brief for the United States and the Federal Trade Commission as Amici Curiae* at 18-19. Notwithstanding that acknowledgement, the United States asserts that because the Complaint does not adequately allege that Verizon's conduct was exclusionary, the action should be dismissed.[2]

A claim of illegal monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that

[2] United States Br. at 28-29. The United States also criticizes the court of appeals' discussion of monopoly leveraging. Since the Complaint properly alleges the element that is said to be missing from the court of appeals' monopoly leveraging discussion – monopoly power in the relevant market – the disposition of this matter could not be affected by a ruling on the issue. The United States comes close to conceding that the allegations of the Complaint make any dispute about monopoly leveraging a moot point. *Id.* at 26 n.12.

power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The Complaint alleges the requisite market power, J.A. 45 (Am. Compl. ¶ 48), and the adequacy of that allegation is not questioned. The only remaining issue, therefore, is whether the Complaint adequately alleges the second *Grinnell* element, "exclusionary conduct." *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). The United States is wrong in judging the Complaint deficient in that regard.

A complaint may be dismissed only if, under its allegations, there is no conceivable set of facts that the plaintiff could prove to establish a right to relief. *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 746 (1976) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Complaints, moreover, need not detail the factual basis of the plaintiff's claims, but must only give fair notice of the claims the defendant faces. *Swierkewicz v. Sorema*, 534 U.S. 506, 512 (2002).

Trinko's Complaint more than meets these requirements. It alleges that Verizon engaged in "exclusionary and anticompetitive behavior"; attempted to reduce competitors' market share "on a basis other than efficiency;" and, "impaired competition . . . in an unnecessarily restrictive way." J.A. 46 (Am. Compl. ¶ 52). In addition, the Complaint alleges that Verizon lacked a valid "business reason" for its conduct. J.A. 47 (Am. Compl. ¶ 57). Each of these allegations describes exclusionary conduct. *See Aspen Skiing*, 472 U.S. at 604, 605, 608-09.

The Complaint also identifies particular exclusionary behavior. It alleges that Verizon provided service to competitors at a lower level than it provided itself, J.A. 39, 46 (Am. Compl. ¶¶ 21, 54); deviated from its normal schedule for filling competitors' orders, J.A. 39 (Am. Compl. ¶ 21); failed to fill competitors' orders on a timely basis or at all, *id.*; and failed to inform competitors of the status of their orders, *id.* The Complaint goes on to allege that Verizon's behavior injured competitors and adversely affected consumers' ability to obtain satisfactory telephone service. J.A. 47 (Am. Compl. ¶ 57). A showing that conduct by a monopolist degrades the service consumers receive and injures competitors can establish that that conduct is exclusionary. *Aspen Skiing* 472 U.S. at 605 ("impact on consumers and whether [conduct] has impaired competition in an unnecessarily restrictive way" is relevant to exclusionary characterization).

According to the United States, all this is not enough, because Trinko was required to plead that Verizon's conduct "would not make business sense unless it tended to eliminate or lessen competition."[3] Whatever merit this has as an articulation of the exclusionary conduct requirement, it is not the only way to notify a defendant of a claim for monopolization, even when access to the monopolist's facilities may be at issue. The various formulations of the conduct element articulated in *Aspen Skiing* are proof enough of that. *Aspen Skiing* 472 U.S. at 604, 605, 608-09. The Complaint alleges that Verizon's conduct was exclusionary, anticompetitive, and unnecessarily restrictive; it further alleges that the conduct lacked valid business reasons, injured competitors and adversely affected

[3] United States Brief at 28. The United States also calls for allegations related to prices, costs and profitability. *Id.* There is no requirement to plead such evidentiary detail in a complaint. *Swierkewicz v. Sorema*, 534 U.S. at 511-12.

consumers. It also identifies particular respects in which that conduct harmed consumers and competition. Those allegations unquestionably notify Verizon of the nature of and basis for Respondent's claim. That is all that is required in a complaint, *Swierkewicz v. Sorema*, 534 U.S. at 514, and for that reason the decision of the Court of Appeals must be affirmed.

II. THE COURT SHOULD NOT RESTRICT THE STANDARDS FOR IDENTIFYING EXCLUSIONARY CONDUCT

A. A Finding of Exclusionary Conduct Should be Grounded in Consumer and Competitive Harm

A monopolist's conduct is illegal when, considering its impact on consumers, it "impaired competition in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605. This standard for exclusionary conduct is directed to the consumer welfare purpose at the heart of the Sherman Act, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), yet flexible enough to encompass the many varieties of conduct that might illegally maintain or extend monopoly power.

Verizon and *amici* would restrict exclusionary conduct to that which makes no business sense apart from its tendency to create monopoly returns. Brief for Petitioner at 21, 22; United States Brief at 15 ("no economic sense"), 16. This limited test fails to encompass the harms at which Section 2 is directed. By focusing entirely on the defendant's perspective and its reasons for its conduct, the "no business sense" approach overlooks the effect of the challenged conduct on competition and consumers. "[A]n expectation of consumer harm must always be at the logical end of any determination that a particular act 'monopolizes,' and thus satisfies §2's conduct requirement." 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 651d1, at 80.

Under the Complaint, it is open to Trinko to prove that, as a result of Verizon's conduct, Verizon itself performed less efficiently, its rivals were less capable competitors, competition suffered, and consumers were worse off. J.A. 39, 46, 47 (Am. Compl. ¶¶ 21, 54, 57). It cannot be that these effects are of no consequence if the monopolist can establish that its conduct led to some business benefit, however slight. Rather, the legality of such conduct depends on an overall assessment of net competitive effect – whether the conduct is "unnecessarily restrictive." *Aspen Skiing*, 472 U.S. at 605; *see also United States v. Microsoft*, 253 F.3d 34, 59 (D.C. Cir. 2001) (*en banc; per curiam*) (balance competitive harm against business justification).

The Court should also reject Verizon's proposal to restrict illegality to circumstances in which the defendant refuses to provide a competitor exactly what it is providing to others on exactly the same terms. Verizon arrives at this by deriving a rule essentially restricted to the facts of certain of the Court's decisions. Brief for Petitioner at 17-19. As an initial matter, the proposed rule would be unwise from the competitive point of view. It would give monopolists a perverse incentive to guarantee against refusal to deal liability by refusing to deal with competitors at all, even when that relationship might be pro-competitive.

More generally, the Court has rejected invitations to fashion special rules that would rigidly confine the inquiry in Sherman Act cases. The consistent lesson of the Court's monopolization decisions has been that cases should be decided by careful attention to their facts. In *Aspen Skiing* the Court declined to be bound to the fact pattern of its earlier decision in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). *Aspen Skiing*, 472 U.S. at 603 (rule establishing monopolist's duty to deal "not so narrow that it encompasses no more than the circumstances of *Lorain Journal*").

The Court reaffirmed this approach in its 1992 *Kodak* decision:

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record."

Eastman Kodak Co. v. Image Tech. Svcs., Inc., 504 U.S. 451, 466-67 (1992), *quoting Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563, 579 (1925).

Here, too, the Court should eschew a formalistic rule and allow the case to proceed to an examination of "actual market realities." A variety of decisions illustrate why courts must have that flexibility if they are to protect consumers from the many exclusionary tactics that a monopolist might devise.[4] Such considerations are particularly significant in this case. Trinko's Complaint alleges that Verizon restrained competition and caused consumers to suffer poor service through conduct that as alleged would be illegal regardless of whether it is characterized as a refusal to deal. J.A. 39, 46, 47 (Am. Compl. ¶¶ 21, 54, 57). The proposed restrictions on refusal to deal doctrine might therefore have no application in this case.

[4] *E.g., Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), *cert. denied* 154 L.Ed. 2d 850 (2003); *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

B. The Essential Facilities Doctrine Provides a Useful Framework for Identifying Exclusionary Conduct

The essential facilities doctrine is normally understood to require a showing of four circumstances: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.[5] This articulation of the doctrine has gained wide acceptance in the lower courts. 1 ABA Section of Antitrust Law, Antitrust Law Developments at 279, n.283 (5th ed. 2002). By applying the four *MCI* factors, a court can systematically evaluate the effect of a monopolist's conduct. The United States finds that the *MCI* test can be "helpful," and details the relevance of three of its four elements. United States Brief at 21 n.6.

The United States proposes that the Court severely limit the doctrine by adopting the defendant-focused approach suggested above – that the challenged refusal of access must make "no business sense." United States Brief at 20-25. For all the reasons discussed above, that approach is fatally flawed, because it is at best a partial answer to the fundamental questions: whether a denial of essential facilities harms consumers and is anticompetitive. *Supra* Section I. If those questions are properly answered in an essential facilities case, the doctrine is a useful analytical approach that will yield beneficial results for consumers and competition.

[5] *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied* 464 U.S. 891 (1983). Even Professor Areeda found that the essential facilities doctrine yielded a correct result in *MCI*. Areeda, *The Essential Facility Doctrine: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, n.21 (1989).

Verizon argues primarily that the essential facilities doctrine as Verizon interprets it does not apply in this case, and urges the Court not to adopt the doctrine. Brief for Petitioner at 40-43. We agree with Petitioner that the Court should not consider the application of the essential facilities doctrine in this case, but for far different reasons.

According to Verizon, *MCI* is the only case imposing liability for unilateral action using an essential facilities approach. In *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1971), *cert. denied* 404 U.S. 1047 (1972), however, the essence of the essential facilities problem was the refusal of a lease-holder to waive a lease covenant that gave it exclusive access to a stadium to use for professional football games. Although the lease agreement formed the basis for a claim under Section 1 of the Sherman Act, the lease-holder's refusal was a unilateral act; there was no joint ownership of the stadium by competitors that could serve as a principled basis for distinguishing the decision as one involving concerted action. Similarly, *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) also involved a unilateral refusal to deal by a defendant who controlled a sports venue. Although the court found a conspiracy between that defendant and those who were given a lease to the facility, again the facility was not controlled by a collection of competitors. In addition, *Aspen Skiing* and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), indisputably cases of unilateral action, have been characterized by courts of appeals as essential facilities decisions. *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376-377 (7th Cir. 1986) (*Aspen Skiing, Otter Tail*; Posner, J.); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 543 (9th Cir. 1991) (*Otter Tail*). The essential facilities doctrine, therefore, enjoys robust precedential support.

Nevertheless, this case is not an appropriate vehicle for a ruling on the essential facilities doctrine, for several

reasons. As discussed above, the Complaint alleges all the elements of illegal monopolization, including the exclusionary conduct that is said to be missing from the court of appeals' articulation of the essential facilities doctrine. *Supra* Section I; *see* United States Brief at 22. An essential facilities ruling by the Court, therefore, will not alter the result in this case. That ruling, moreover, would be based on the mere allegations of a complaint – the thinnest possible record at the earliest possible stage.

In addition, the treatment of the essential facilities doctrine in the lower courts suggests that there is no need for the Court now to reach out and rule on its validity or limits. In particular, it does not appear that the doctrine has caused the mischief attributed to it. In applying the doctrine, the lower courts have interpreted its elements to take into account the competitive concerns at stake.[6]

We respectfully submit that it would be prudent for the Court to await a more fully developed record before considering a ruling on the essential facilities doctrine.

C. Regulation Does not Justify *De Facto* Antitrust Immunity

The law concerning the effect of regulation on antitrust challenges to telephone monopolists has been characterized by two important principles. First, the consistent holding of courts before the passage of the Telecommunications Act of 1996 was that regulation of the telephone business does not

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[6] *See, e.g., Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986); *MCI, supra. See generally, Alaska Airlines, Inc. v. United Airlines*, 948 F.2d at 543 (finding facility "essential" only if it carries power to eliminate competition; analyzing *Twin Laboratories, Olympia* and *MCI* as making similar finding).

create immunity from the antitrust laws. *E.g., Southern Pacific Communications Co. v. AT&T*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1005 (1985); *Phonetele, Inc. v. AT&T*, 664 F.2d 716 (9th Cir. 1981), *cert. denied* 459 U.S. 1145 (1983). The 1996 Act seemingly put the matter beyond question with a savings clause.[7] Second, lack of immunity notwithstanding, the effect of regulation on the market can be taken into account in judging the antitrust merits. *Southern Pacific*, 740 F.2d at 1000; *Phonetele*, 664 F.2d at 742-43.

Petitioner and the other incumbent telephone companies argue that the antitrust laws should not apply when allegedly illegal conduct implicates a duty subject to regulation under the 1996 Act. Brief for Petitioners at 34-39; *Brief Amicus Curiae of BellSouth Corporation, SBC Communications Inc., and Qwest Communications International Inc. In Support of Petitioner* at 22-30. It is hard to see the limit on this position, and Petitioner and *amici* suggest none. Its adoption would mean that virtually all commercial relations between incumbent carriers and the competitors to which they wholesale would be exempt from antitrust scrutiny. This was clearly not Congress' intent.

The arguments offered to justify this *de facto* immunity are essentially equivalent to the claims of "pervasive regulation" that were regularly rejected as a basis for immunity in the telephone industry *before* the Communications Act included an antitrust savings clause. *See, e.g., MCI*, 708 F.2d at 1101-05. For the reasons

[7] The "savings clause provides that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152 nt (b).

articulated in *MCI* and the consistent line of decisions to the same effect,[8] this claim should be rejected again.

A *per se* conclusion that the antitrust laws do not apply because regulation eliminates any risk to competition and antitrust law somehow threatens the regulatory apparatus is inconsistent with the evident intent of the 1996 Act's savings clause, which embodies a congressional judgment that there should be two legal regimes promoting telephone competition: regulation and antitrust. *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1281-82 (11th Cir. 2002), *cert. pending*, No. 02-1423. It does not do to assume, as Petitioner's exemption argument must, that the regulation that Congress created in the 1996 Act will work with virtual perfection to protect consumers, but that the congressional choice to couple regulation with antitrust scrutiny was so flawed that the Court must undo that choice.

There is no factual basis – nor evidence – for the conclusion that regulation will cure all competitive ills. Verizon would have the opportunity at trial to offer proof that regulation prevented harm to consumers from the conduct alleged in the Complaint. *See Phonetele*, 664 F.2d at 742 ("impact of regulation must be assessed simply as another fact of market life"). There is no warrant, however, for any court simply to assume without proof that that has occurred in this case, let alone in the broad class of cases the Court is asked to preempt. In the final analysis, the issue is the market effect of regulation, not what legislators wanted that market effect to be. *Southern Pacific*, 740 F.2d at 1000; *Phonetele*, 664 F.2d at 742-43. Making that determination requires evidence that is not yet before the Court.

[8] *E.g., Southern Pacific Communications v. AT&T, supra*; *Phonetele, Inc. v. AT&T, supra*; *Essential Communications Sys., Inc.* v. *AT&T*, 610 F.2d 1114 (3d Cir. 1979).

For the same reasons, the Court should reject the unsupported prediction that antitrust cases involving conduct regulated by the 1996 Act will threaten the regulatory scheme of the 1996 Act. It bears repeating that Congress explicitly confirmed that the legislative design includes action under the antitrust laws; courts cannot simply ignore that as an unwise choice. As this Court has previously demonstrated, the presence of regulation can decrease concerns about an antitrust court's role in decisions concerning regulated industries. *See Otter Tail*, 410 U.S. at 375-77; *see also* Areeda, *The Essential Facility Doctrine*, 58 Antitrust L.J. at 853. In addition, courts dealing with regulated industries have recognized that they must accommodate their rulings and remedies to avoid interference with the regulatory scheme. *E.g., Otter Tail*, 410 U.S. at 381-82. There is no reason to assume that they will shirk this duty.

III. RESPONDENT HAS STANDING TO MAINTAIN THIS ACTION

Under section 4 of the Clayton Act, any person "injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." 15 U.S.C. § 15. This broad grant is "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). This court has thus held that any limits on this broad grant must be based on congressional intent. *Associated General Contractors v. California Council of Carpenters*, 459 U.S. 519, 534-35 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472-73 (1982) ("in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives.").

In determining whether a plaintiff has standing under the antitrust laws, courts must assume the plaintiff can prove the facts alleged in its complaint. *Associated General Contractors*, 459 U.S. at 526; P. Areeda & H. Hovenkamp, *Fundamentals of Antitrust Law* ¶ 3.01, at 71 (2002).

Accepting the complaint's allegations, courts first ascertain that the plaintiff suffered injury-in-fact. Courts next examine whether the plaintiff has alleged antitrust injury. Finding both, the inquiry turns finally to ensuring that the plaintiff satisfies other prudential concerns, including ensuring a sufficiently direct claim, avoiding complex apportionment or duplication of damages and establishing that plaintiff is suitably positioned to vindicate the policies animating every antitrust action. As discussed below, Trinko satisfies these standing requirements.

It is clear from the Complaint that plaintiff suffered injury-in-fact. "Causation, or injury-in-fact, requires a showing that the injury of which the plaintiff complains actually resulted from those acts of the defendant that violated the antitrust laws." P. Areeda & H. Hovenkamp. *Fundamentals of Antitrust Law* ¶ 3.01d, at 68 (2002). The complaint alleges that Trinko experienced poor service. J.A. 48 (Am. Compl. ¶ 59). This poor service was "caused" by defendant's conduct. J.A. 47, 48 (Am. Compl. ¶¶ 57, 59). *See Associated General Contractors*, 459 U.S. at 542-43; *see generally Antitrust Law Fundamentals* ¶ 3.04. Verizon's use of its monopoly to impede its rival AT&T was the "material" and "substantial" cause of the plaintiff's injury. J.A. 47, 48 (Am Comp. ¶¶ 57, 59). *See Antitrust Law Fundamentals* ¶ 3.04 at 88 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969)). Trinko therefore demonstrates injury-in-fact sufficient to satisfy this aspect of the standing inquiry.

The "antitrust injury" that plaintiff must also demonstrate is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). *See also Associated General Contractors*, 459 U.S. at 539-40; *Antitrust Law Fundamentals* ¶ 3.03, at 77. The Court has been clear that "while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress, that is not the only form of injury remediable under § 4." *McCready*, 457 U.S. at 482-83 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979)). A central interest of the antitrust laws is "protecting the economic freedom of participants in the relevant market." *Associated General Contractors*, 459 U.S. at 538. As a consumer of local telephone service, Trinko was a participant in the market in which trade was restrained and felt the effects of the illegal conduct. J.A. 40 (Am. Compl. ¶ 23). *See Antitrust Law Fundamentals* ¶ 3.03. As alleged, Verizon's conduct limited competition in the local services market by degrading the services its rivals provided. This harm to AT&T's customers, therefore was the "very means by which it is alleged that [Petitioner] sought to achieve its illegal ends." *McCready,* 457 U.S. at 479. Trinko's injury flowed from that breakdown of competition, J.A. 48 (Am. Compl. ¶ 59), establishing antitrust injury. *See Antitrust Law Fundamentals* ¶ 3.03.

A. Trinko's Injury was Sufficiently Direct to Warrant Antitrust Standing

In determining antitrust standing, courts look to a plaintiff to show "that he is within the area of the economy which is endangered by a breakdown of competitive conditions." *Antitrust Law Fundamentals* ¶ 3.05f, at 107 (citations omitted). "Whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased

the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits." *McCready,* 457 U.S. at 475. Thus, the Court has held that if direct competitors as well as "the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready*, they would have a right to maintain their own treble damages actions against the defendants." *Associated General Contractors*, 459 U.S. at 541.

Respondent is such an immediate victim, and thus is entitled to recover. As was the case in *McCready,* 457 U.S. at 475 n.11, "[t]he nature of [the] injury is easily stated": As the direct result of Verizon's anticompetitive conduct, Trinko, and similarly situated consumers seeking a competitive alternative to Verizon, received poor services in the form of delays and generally inferior treatment. J.A. 40, 47, 48 (Am. Compl. ¶¶ 23, 57, 59). That Trinko's service was thus affected was an inevitable result of Verizon's actions. There was no intervening "chain of causation between the injury and the alleged restraint," because Verizon's competitors had no alternative to dealing with Verizon. *Associated General Contractors*, 459 U.S. at 540. This is direct injury that supports standing. In *McCready,* the plaintiff's employer could have elected to choose another plan, 457 U.S. at 480 n.17. AT&T had no such choice of underlying providers. The facilities AT&T purchased from Verizon and used to provide service to Trinko were solely available from Verizon by virtue of its monopoly over those lines. J.A. 40 (Am. Compl. ¶¶ 24-25).

Verizon contends that Trinko lacks standing because the injury suffered was indirect. Brief for Petitioner at 45-46. Petitioner's treatment of the directness of the injury is misplaced, *Antitrust Law Fundamentals* ¶ 3.05g, at 106 (privity not strictly required), and conveniently overlooks

this Court's analysis of the issue as summarized in *Associated General Contractors*:

> [I]n the *McCready* case, the plaintiff was the direct victim of unlawful coercion. As the Court noted, "McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services." Her status was thus comparable to that of a contracting or subcontracting firm that refused to yield to the defendants' coercive practices and therefore suffered whatever sanction that coercion imposed. Like McCready, and like Connell Construction Co., *such a firm could maintain an action against the defendants*.

459 U.S. at 540 n.44 (emphasis added, internal citations omitted). Here, as in *McCready,* Trinko was unavoidably the victim of Verizon's unlawful conduct. Trinko's service was degraded by Verizon's anticompetitive tactics. J.A. 48 (Am Compl. ¶ 59). Like McCready, Trinko did not to yield to the pressures of Verizon's illegal behavior. Accordingly, Trinko, like McCready, has standing to sue.

The injury to plaintiff was "inextricably intertwined" with the injury to the affected competitor. *McCready,* 457 U.S. at 484. *See also Associated General Contractors*, 459 U.S. at 538; *Antitrust Law Fundamentals* ¶ 3.05f, at 105. As in *McCready*, the injury "flows from that which makes defendants' acts unlawful" and does not "seek to label increased competition as a harm." *McCready*, 457 U.S. at 484; *Brunswick*, 429 U.S. at 488. Unlike the Union in *Associated General Contractors*, plaintiff is a consumer in the market in which trade was restrained, and thus was directly disserved by Verizon's efforts to hamper competition in the market. J.A. 46 (Am. Compl. ¶ 52). *See*

Associated General Contractors, 459 U.S. at 539. In this case, therefore, allowing Respondent's claims appropriately links recovery with procompetitive policy. *McCready*, 457 U.S. at 482; *Brunswick*, 429 U.S. at 488.

Respondent's injuries were also the foreseeable and proximate result of Petitioner's illegal conduct. *Associated General Contractors*, 459 U.S. at 535-36; *McCready,* 457 U.S. at 479*; Antitrust Law Fundamentals* ¶ 3.05a, at 96. As in *McCready*, the harm to Trinko was an integral aspect of the anticompetitive conduct, and thus "was precisely 'the type of loss that the claimed violations . . . would be likely to cause.'" 457 U.S. at 479 (quoting *Brunswick*, 429 U.S. at 489). In such circumstances, where a customer of a competitor suffers a direct injury from an anticompetitive scheme aimed principally at the competitors, the Court has found standing. *McCready*, 457 at 483-84; *Antitrust Law Fundamentals* ¶ 3.05f, at 106.

B. The Complaint Does Not Seek Damages that Will Lead to Complex Apportionment or Duplication

Respondent's claims will not lead to duplicative recovery or complex apportionment of damages. *Associated General Contractors*, 459 U.S. at 543-44. Respondent seeks "recovery for injuries distinct from those that other parties may have suffered." *Associated General Contractors*, 459 U.S. at 550 (Marshall, J. dissenting). Just as the antitrust injury suffered by the plaintiff in *McCready* was distinct from the antitrust injury suffered by the competitors in the psychotherapy market at issue in that case, 457 U.S. at 475, so here, the recovery sought by AT&T or other competitors would focus on lost competitive opportunities and not on the consumers' service degradation.

This case does not implicate the concerns of passing on, the basis for denying standing in *Illinois Brick Co. v. Illinois,*

431 U.S. 720 (1977). The antitrust injuries suffered by Respondent are distinct from any injury to AT&T, but directly within the realm of injury Congress sought to address with the antitrust laws. *McCready*, 457 U.S. at 484. *See also Associated General Contractors,* 459 U.S. at 540; *Brunswick*, 429 U.S. at 487-88; *Antitrust Law Fundamentals* ¶ 3.05, at 103. Verizon's anticompetitive conduct harmed its rivals, including AT&T, made them less effective competitors and impeded entry by other competitors. J.A. 46-47 (Am. Compl. ¶¶ 52-58). AT&T's claim would not encompass damages resulting from receiving poor local telephone service.[9]

C. Trinko is a Suitable Plaintiff Because the Harm Suffered Is Precisely What the Antitrust Laws Seek to Prevent

Plaintiffs in Trinko's position have strong incentives to identify and prevent anticompetitive conduct. They face a Hobson's choice of selecting between competitors' service degraded as a result of the anticompetitive tactics of the defendant, J.A. 46 (Am Compl. ¶ 52), or purchasing from the defendant directly, with the attendant disadvantages of dealing with a monopolist. Redress for this poor service is only available to the victims if they identify and challenge the underlying source of anticompetitive conduct. Here, as in *McCready*, where "the injury was borne directly by the customers of the competitors," 457 U.S. at 483, "the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." *Id.* at 479.

This is not a case where "the existence of an identifiable class of persons whose self-interest would normally motivate

[9] In any claim by AT&T, antitrust injury would focus on its diminished ability to compete as a consequence of the anticompetitive conduct.

them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to perform the office of a private attorney general." *Associated General Contractors*, 459 U.S. at 542. Disadvantaged competitors have incentives not to pursue antitrust challenges to incumbent monopolists, upon whom they depend and with whom they must deal on a constant basis, because there are no alternative providers. J.A. 39, 40, 45 (Am. Compl. ¶¶ 19, 24, 47.) "When the immediate victim has some reason to avoid suing" there may be "no first best with the incentive or ability to sue." *Antitrust Law Fundamentals* ¶ 3.05, at 101 (citations omitted). Because its service was dependent on Verizon's treatment of AT&T, Trinko has an identity of interest with Verizon's competitor, underscoring Trinko's suitability to press these claims.

Reaffirming the standing of consumers in Petitioner's position would vindicate the interest in private enforcement of the antitrust laws. As the Court noted in *McCready,* "consistent with congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy." 457 U.S. at 472. Denying standing to Trinko would deny compensation for immediate, distinct injuries resulting from Verizon's anticompetitive conduct. "In the face of [congressional antitrust] policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress." *Id.*, 457 U.S. at 472 n.9 (citations omitted). Consequently, this Court has limited standing only in particular cases, where recovery would have been difficult, such as *parens patriae* recovery for damages to the general economy, or where there was an unacceptable risk of duplicative recovery. *Id.*, 457 U.S. at 473-75 (discussing *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972) and *Illinois Brick, supra*). Similar considerations are simply not implicated in this case. Plaintiff's claims are not duplicative of those of Verizon's competitors, because each consumer

plaintiff's injuries relate specifically and exclusively to the poor service received as a result of Verizon's unlawful conduct. The Court should therefore conclude that Trinko has standing, for "[o]nly by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully served." *McCready*, 457 U.S. at 473 n.10 (citations omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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In The

Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE PROJECT TO PROMOTE COMPETITION AND INNOVATION IN THE DIGITAL AGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT TO THE LIMITED EXTENT OF CLARIFYING SHERMAN ACT SECTION 2 ANALYSIS

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THE INTEREST OF PROCOMP

The Project to Promote Competition and Innovation in the Digital Age ("ProComp") is a trade association founded in 1998 by high tech enterprises such as Sun Microsystems, Oracle, Netscape, and the Sabre Group to analyze competition and other policy issues relating to information technology. ProComp's membership consists of companies and trade associations with particular knowledge and expertise in software and other high technology markets. ProComp has no shareholders or other owners.[1]

ProComp had no special interest in this case when it was first heard in the District Court or in the Court of Appeals, but became interested after reading briefs explaining that the Department of Justice and Federal Trade Commission did not support the "balancing approach" expressed in the D.C. Court of Appeals' decision in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.) (*en banc*), *cert. denied*, 534 U.S. 952 (2001). ProComp supports the principles set forth in that decision and supports Respondent to the limited extent of clarifying Sherman Act Section 2 analysis. Some of ProComp's members have filed or may file lawsuits against Microsoft alleging Section 2 violations. We discuss in this brief both the essential facilities doctrine, and the effect of contract breaches in Section 2 cases, because of the interest of members in private litigation, not because either of these questions is presented in *Microsoft*.

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[1] Pursuant to Supreme Court Rule 37.6, ProComp states that no counsel for a party to this case authored this brief in whole or in part. No monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae*. The only entity, other than *amicus curiae*, who assisted in the preparation of this brief is counsel to Sun Microsystems. In accordance with Supreme Court Rule 37.3(a), ProComp submits this brief pursuant to the blanket consents granted by Petitioner on May 15, 2003 and Respondent on May 19, 2003, which have been filed with the Court.

SUMMARY OF ARGUMENT

The federal agencies' position in this case with respect to balancing, harm to competition, and business justifications, may be inconsistent with the D.C. Circuit's *en banc* decision in the Justice Department's suit against Microsoft; if so, it is wrong. This is not the case for a broad rejection of the essential facilities doctrine. Moreover, a breach of contract may constitute exclusionary conduct supporting a Section 2 violation.

ARGUMENT

I. THE FEDERAL AGENCIES' POSITION IN THIS CASE MAY BE INCONSISTENT WITH THE D.C. CIRCUIT'S *EN BANC* DECISION IN THE JUSTICE DEPARTMENT SUIT AGAINST MICROSOFT; IF SO, IT IS WRONG.

We cannot discern why the Department of Justice thought it necessary to explain to this Court in its brief supporting the grant of the petition for certiorari that it did not support the approach for analyzing Section 2 cases articulated by the D.C. Circuit *en banc* in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied* 534 U.S. 952 (2001). In that brief, it states:

> In *United States v. Microsoft Corp.*, . . . the en banc District of Columbia Circuit suggested, as one step of its analysis under Section 2, a "balancing approach" analogous to the "rule of reason" standard applied under Section 1 of the Sherman Act. The United States did not suggest or endorse such a "balancing approach" in the *Microsoft* case.

(Cert. Brief at 11 n.2.)

In its *en banc* opinion in *Microsoft*, the D.C. Circuit articulated a four-part test to determine whether a monopolist's conduct is exclusionary. "First, to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.'" *Microsoft*, 253 F.3d at 58. Second, "the plaintiff must show that its injury is 'of the type that the statute was intended to forestall,' . . . that the monopolist's conduct

harmed competition, not just a competitor." *Id.* "Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the *monopolist may proffer* a 'procompetitive justification' for its conduct." *Id.* (citing *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 483 (1992)) (emphasis added). "Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.*

In the appeal of *Microsoft*, the Department took the position that the burden of demonstrating that the defendant's conduct made "economic sense" was on the defendant, and that the plaintiff need only prove "exclusionary or anticompetitive behavior" that "threatens to defeat or forestall the corrective forces of competition."[2] The Department correctly noted in its brief in *Microsoft*:

> [A]s the Supreme Court's decisions in *Eastman Kodak* and *Aspen* illustrate, there is nothing improper about requiring a monopolist to come forward with legitimate business justifications for conduct that appears to be anticompetitive."[3]

However, in their Merits Brief in this case, the federal agencies said, "[w]here, as here, the plaintiff asserts that the defendant was under a duty to assist a rival . . . conduct is not exclusionary or predatory *unless* [emphasis in original] it would make *no economic sense* [emphasis added] for the defendant but for its tendency to eliminate or lessen competition." (Merits Brief at 15.) Petitioner Verizon cites this portion of the federal agencies' brief and states, "Respondent's proposed expansion of Section 2 cannot be squared with a basic Section 2 principle – that unilateral conduct is lawful as long as it makes business sense apart

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[2] Department of Justice Appellate Brief at 48-49, *Microsoft* (relying on *Eastman Kodak*).

[3] *Id.* at 49-50.

from enabling monopoly returns." (Petitioner's Cert. Brief at 11.) The quoted language should not be read to suggest that the fourth part of the D.C. Circuit test is not necessary if defendant proffers a facially plausible justification.

Business efficiency is an affirmative defense and, in the right circumstances, can appropriately lead to a balancing of pro- and anticompetitive effects. Balancing is necessary where both efficiency and anticompetitive effect are present. Balancing has been raised only tangentially by the government and it would be premature to make a definitive ruling on the broad question of balancing without the issue being fully briefed and squarely before the Court. The District of Columbia Circuit's four-part test articulated in *Microsoft* is clearly a correct statement of the law.

II. THIS IS NOT THE CASE FOR A BROAD REJECTION OF THE ESSENTIAL FACILITIES DOCTRINE.

It is true that the essential facilities doctrine has not been explicitly recognized by the Court. The federal agencies and Petitioner Verizon come to the edge of inviting its general repudiation, but seem to step back. Wholesale repudiation of the doctrine would be unwise. Even the late Professor Areeda was unprepared to abandon the doctrine across the board when he proposed its limitation.[4] *MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983), is rightly recognized both by Professor Areeda and the federal agencies' Merits Brief as having value because it does require evidence of exclusionary conduct.[5] The Telecommunications Act of 1996 imposes a greater statutory duty to deal with competitors on ILECs than would be imposed in an unregulated market. It would be unnecessary to decide here the abstract

[4] Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841 (1989).

[5] *Id.* 58 Antitrust L.J. 841, 845, 852; Merits Brief at 21-22.

question of whether an essential facility is ever appropriate as a basis of liability in a Section 2 case.

III. A BREACH OF CONTRACT MAY CONSTITUTE EXCLUSIONARY CONDUCT SUPPORTING A SECTION 2 VIOLATION.

The federal agencies characterize Respondent Trinko's claim in this case as a monopolist's "breach of an agreement to deal on particular terms." (Merits Brief at 20.) They suggest that the antitrust law generally should not "interfere" with such breaches – if the breach makes "business sense apart from exclusionary consequences." *Id.* We have no views about the special circumstances of the regulated telecommunications market. But here, too, the federal agencies may be straying beyond the context of this case – to affect unregulated markets. Exclusionary conduct that constitutes a breach of contract may violate Section 2, and indeed be at the very core of the antitrust violation. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), where the refusal to deal made some non-exclusionary economic sense (but not much) – the antitrust violation would have resulted from, and been no less, if Aspen Skiing had breached its contract with Aspen Highlands, rather than merely failing to renew it. *See also Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328-9 (1955), where the Court held that a course of exclusionary conduct that was the subject of a preexisting settlement agreement could create new liability if that course of conduct was repeated. There should be no implication that the antitrust laws are displaced simply because some anticompetitive conduct could also be styled as a breach of contract.

CONCLUSION

Monopolists who engage in exclusionary conduct which causes competitive harm that outweighs efficiency justifications should not be protected from judicial scrutiny of their compliance with Section 2 of the Sherman Act.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals erred in reversing the district court's dismissal of respondent's antitrust claims.

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CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief *amici curiae*. Their written consents have been filed with the clerk of this Court.

INTEREST OF *AMICI*

This brief *amici curiae* is submitted on behalf of the legal academics listed in the appendix to this brief. They are are teachers and scholars of federal antitrust law. Like the enforcement agencies, these *amici* academics seek to ensure a proper interpretation and application of those laws. The *amici* have received no compensation for submitting this brief.

STATEMENT

This case arises under § 2 of the Sherman Act and involves the sufficiency of allegations of anticompetitive conduct in the market for local telephone service. Historically, federal and state regulators sought to protect the telephone-using public by regulating local telephone service monopolists. In the Telecommunications Act of 1996, Congress preempted the laws designed to maintain this monopoly structure, 47 U.S.C. § 253(a), and mandated that thenceforth "vigorous economic competition" in local telephone service would be national policy, 47 U.S.C. § 257(b).

To overcome the entrenched position of the incumbent local exchange carriers ("ILECs"), Congress imposed a duty to cooperate in providing local service. This duty mirrors the cooperative practices that have flourished in the comparable competitive, long distance telephone service market. First, all local service competitors must interconnect, just as all local and long distance providers interconnected as a result of the antitrust litigation against AT&T. Second, ILECs must offer competitors their service in bulk at wholesale rates for resale, a common practice among long distance telephone service providers. And third, incumbents must offer certain elements of their network, such as the local loops necessary to reach

each telephone user, on an unbundled basis at reasonable rates. Again, this requirement resembles the regular practice in the long distance markets in which ILECs permit long distance providers to use local loops and other local network elements to reach their customers.

In this case, Respondent, Law Offices of Curtis V. Trinko ("Trinko"), sued Bell Atlantic Corporation, now Verizon Communications Inc. ("Verizon") alleging that Verizon, an ILEC, violated § 2 of the Sherman Act by failing to interconnect efficiently with competitive local exchange carriers ("CLECs"). Verizon had previously entered inter-connection agreements with CLECs as required by the 1996 Act. Trinko alleged, however, that Verizon sought to undermine the very competition that the interconnection agreement was intended to enable. Verizon accomplished this objective by providing inferior interconnection services to the CLECs' customers, thereby "making it difficult for [their competitors] . . . to obtain full use of [the] local [telephone] lines." J.A. 35 (Am. Compl. ¶ 2). Verizon moved to dismiss this claim, and the issue here is whether Trinko's allegations are sufficient to establish a §2 violation.

The basic elements of a § 2 claim are well established. "The offense of monopoly . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 480 (1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966)).

Verizon does not contend that Trinko failed to allege monopoly power in the market for local telephone service. This case thus turns entirely on whether Trinko alleged facts sufficient to establish the second element of the monopolization test, *i.e.* whether Verizon *willfully* maintained its power.

Trinko's allegations track this Court's pronouncements with respect to § 2 claims. Paragraph 21 of the Amended Complaint sets out some of the challenged conduct, alleging as follows:

> Bell Atlantic has not afforded CLECs access to the local loop on a par with its own access. Among other things, Bell Atlantic has filled orders of CLEC customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with Bell Atlantic. J.A. 39 (Am. Compl. ¶ 21).

Additional paragraphs allege that this conduct has had the requisite effect on competition that this Court has required to state a monopolization claim. Paragraph 52 alleges that Verizon was "attempting to exclude or reduce the market share of rivals in the Local Phone Service [market] *on a basis other than efficiency*, *i.e.*, by making it difficult for its competitors to provide service in the Local Phone Service market on the level that Bell Atlantic is able to provide to its customers in that market." J.A. 46 (Am. Compl. ¶ 52) (emphasis added). And ¶ 57 alleges anticompetitive effect, asserting that Verizon's "conduct has directly and adversely impacted upon the ability of consumers . . . to obtain satisfactory Local Phone Service" and that "[t]here is no valid business reason for Bell Atlantic's behavior with respect to providing access to its local loop." J.A. 47 (Am. Compl. ¶ 57).

The district court dismissed the claim on the ground that these allegations were insufficient to state a claim. Pet. App. 49a-61a, 64a-68a. The Second Circuit reversed on the issue before this Court. Pet. App. 1a-48a.

This is but one of several recent antitrust cases in which consumers and competitors have charged ILECs with preventing or delaying CLECs from entering local telephone service markets.[1] The conduct alleged in these cases has been similar to the conduct alleged by Trinko. For example, Cavalier Telephone alleged "that Verizon mis-routed Cavalier's calls, . . . supplied Cavalier with an inferior Web interface for use in ordering loops, . . . and . . . intentionally made the billing process for loops costly for its competitors." *Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 208 F. Supp. 2d 608, 612 (E.D. Va. 2002), *aff'd*, 330 F.3d 176 (4th Cir. 2003). And Covad Communications alleged that Bell South delayed interconnection; imposed unnecessary costs on its competitors; and strategically understaffed certain operations to delay Covad's customers' ability to obtain service. *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1277-78 (11th Cir. 2002). If the allegations in these cases are true, there is a nation-wide pattern of behavior by incumbent local telephone companies that is restraining the growth of competition in local telephone service. The question posed in this case is whether these allegations can be tested in a § 2 case.

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[1] *Covad Communications Co. v. Bell Atl. Corp.*, 201 F. Supp. 2d 123 (D.D.C. 2002); *Cavalier Tel., L.L.C. v. Verizon Va. Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002), *aff'd*, 330 F.3d 176 (4th Cir. 2003); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002); *Davis v. Pac. Bell*, 204 F. Supp. 2d 1236, 1242 (N.D. Cal. 2002); *Supra Telecomms. & Info. Sys., Inc. v. BellSouth Telecomms., Inc.*, 2001 U.S. Dist. LEXIS 23816 (S.D. Fla. June 8, 2001); *MGC Communications, Inc. v. BellSouth Telecomms., Inc.*, 146 F. Supp. 2d 1344 (S.D. Fla. 2001); *Stein v. Pac. Bell Tel. Co.*, 173 F. Supp. 2d 975 (N.D. Cal. 2001); *Intermedia Communications, Inc. v. BellSouth Telecomms., Inc.*, 173 F. Supp. 2d 1282 (M.D. Fla. 2000); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).

SUMMARY OF ARGUMENT

I. The amended complaint alleges a claim under § 2 of the Sherman Act because Trinko has alleged that Verizon has (1) monopoly power in the local telephone service market and (2) engaged in inefficient conduct designed to, and with the effect of, maintaining that monopoly power.

In cases challenging a monopolist's refusal to deal, this Court has required the plaintiff to prove that the defendant engaged in inefficient conduct that harms *consumers* by increasing price and reducing output, quality, or consumer choice. Here Trinko alleges that Verizon interfered with the efficient interconnection of its local telephone network to the operations of CLECs. That conduct is inefficient because it hinders the ability of consumers to obtain local telephone service from the carrier that provides the price, quality, and service combination that is most desirable to each customer. Because Trinko alleges that Verizon has no legitimate business justification for this conduct, it states a § 2 claim.

Verizon and the United States argue for dismissal on the ground that only a refusal that serves no purpose but to preserve monopoly power may be predatory. Although that standard is defective for failing to focus on consumer welfare, it nonetheless would not support dismissal here. In a network market such as local telephone service, all competitors depend on the efficiency of the interconnection. No rational firm in a competitive network market would intentionally undermine that efficiency goal for fear of reprisal from its competitors. Verizon's alleged conduct makes economic sense only if it enabled Verizon to maintain its monopoly power.

The United States also appears to argue that only refusals to deal that cause a monopolist to sacrifice short run profits may be predatory. But a monopolist is more likely to engage in anticompetitive schemes that do not require it to bear such

losses. As a result, § 2 should extend to profitable conduct that inefficiently excludes competitors. The appropriate focus is on the effect of the refusal on consumer welfare, not corporate profits.

Verizon contends that a refusal to deal may be predatory only where the monopolist has previously offered the same product to another competitor on terms denied to the plaintiff. That anti-discrimination principle finds no support in the Sherman Act case law. This Court has favored a case-by-case analysis of the actual competitive effects of the challenged conduct in the relevant market rather than bright line rules of *per se* legality. And that careful analysis simply cannot be conducted on the pleadings. Moreover, it would provide a perverse incentive for a monopolist to avoid procompetitive cooperation for fear that entering a deal with one competitor would expose it to antitrust liability if it failed to offer the same deal to all.

The 1996 Telecommunications Act strengthens Trinko's monopolization claim. The Act contains an explicit antitrust savings clause requiring that conduct covered by the 1996 Act must be scrutinized under the antitrust laws. Congress thus made patently clear its intent to require antitrust review of conduct falling within the confines of the 1996 Act.

Despite the clear language of the statute, Verizon in effect argues for an antitrust exemption. Because courts regularly pursue consumer welfare goals in antitrust cases, however, telecom regulators have no special advantage in evaluating conduct under the 1996 Act. In any event, the record before this Court is insufficient to establish whether the scope of review by telecom regulators would be sufficient to protect antitrust goals even if preemption were an option.

Far from exempting otherwise illegal conduct, the 1996 Act should assist the Court in determining that the challenged conduct is potentially predatory. Although a violation of the

1996 Act is not *ipso facto* a violation of the Sherman Act, Congress' decision to require certain cooperative behavior to enable competition to emerge is a factor that weighs against dismissing the complaint.

Verizon argues that despite Congress' intentions, the duties imposed by the 1996 Act are likely to have anticompetitive effects that conflict with the antitrust laws, and that courts are incapable of implementing these duties. Although economic theory recognizes the possibility that the cooperative duties imposed by the 1996 Act may yield anticompetitive results, those duties may yield procompetitive outcomes as well. A court cannot chose between those possibilities without evidence of actual effects in the relevant market; therefore this case should not be resolved on a motion to dismiss.

Finally, an antitrust court need not interfere with regulatory implementation of the 1996 Act. As has been true in past antitrust cases involving regulated industries, a court must carefully tailor any injunctive order to supplement rather than inhibit regulatory activity. An order requiring Verizon not to hinder efficient interconnection would not intrude on any regulatory function or embroil the courts in matters that they are incapable of administering.

II. The essential facilities and monopoly leveraging doctrines are not relevant to the threshold decision before this Court. The United States correctly asserts that harm to competition, rather than the formal satisfaction of the elements of a monopolization doctrine, must be the touchstone of antitrust liability. In appropriate cases, however, the essential facilities or monopoly leveraging doctrines may provide useful frameworks for courts analyzing competition in a particular market.

ARGUMENT

I. THE AMENDED COMPLAINT ALLEGES A SECTION 2 CLAIM BY CHALLENGING INEFFICIENT CONDUCT

To state a § 2 claim, a plaintiff must allege that the defendant (1) possesses "monopoly power in the relevant market" and (2) willfully acquired or maintained "that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 480 (1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966)). Trinko alleges, J.A. 45 (Am. Compl. ¶ 48), and Verizon does not dispute, that monopoly power is adequately stated. The only issue is whether the amended complaint alleges conduct sufficient to meet the second element. Under this Court's precedents, Trinko has properly alleged its claim because undermining the efficiency of the interconnection in a network market may exclude efficient competitors to the detriment of consumers. Verizon's violation of a duty under the 1996 Act reinforces and strengthens that conclusion because Congress's decision to compel cooperation in local phone service is strong evidence that cooperation is efficient, and thwarting it is an anticompetitive, inefficient business practice.

A. A Monopolization Claim Requires Conduct That Restrains Competition On Some Basis Other Than Efficiency

The second element of the monopolization test requires more than the mere possession of monopoly power and the intent to keep it. To violate the Sherman Act, a monopolist must use its "power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Kodak*, 504 U.S. at 483 n.32 (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)). What it means to *use* monopoly

power in one of these inappropriate ways is at the heart of this case.

This Court addressed that issue most directly in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). There it explained that while the defendant's intent to injure a competitor, and the effect of its conduct on competitors, is relevant, a court must also consider the impact of the defendant's conduct "on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id.* at 605.

A clear focus on the effect of a business practice on consumers is essential because "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)). Even pro-competitive, consumer-welfare enhancing conduct may intentionally harm one's competitors. Price cutting and innovation to increase quality, for example, may intentionally drive less efficient competitors from the market. Nevertheless, conduct of this nature does not meet the second element of the monopolization test because consumers benefit from lower prices and higher quality products. The ability of competitors to attract business is adversely affected only to the extent that they are *less efficient* than the monopolist and hence unable to match its price/quality package.

Under §2, a monopolist's conduct can be characterized as unlawfully predatory only when it restrains the output of competitors that are at least as efficient as the monopolist. As the *Aspen* Court put it, "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* In this context, an efficient practice is one that provides consumers with more and better products at lower prices. An inefficient practice is one that increases price and decreases quality, output, or consumer choice.

In *Aspen*, the defendant refused to cooperate with the plaintiff to offer a ski lift ticket that would allow skiers to choose any of the four local mountains. First, the Court observed that multi-mountain lift tickets were common in competitive ski markets, including *Aspen* before the defendant had obtained monopoly power, and thus consumers presumably valued them over single mountain tickets. *Id.* at 603. Second, the Court carefully explored the evidence, finding that consumers would be injured if the all-mountain pass were not available. *Id.* at 605-07. Third, the Court explained that the defendant's conduct had in fact restrained the plaintiff's ability to provide an all-mountain package. *Id.* at 607-08. Finally, the Court reviewed the defendant's arguments that sought to justify its refusal to cooperate on pro-competitive grounds, and the Court found that the jury had sufficient evidence to reject them. *Id.* at 608-09.

In *Kodak*, this Court engaged in a similar analysis on a sparse summary judgment record, emphasizing the difficulty of judging competitive effects without evidence of actual market conditions. There, the defendant refused to sell spare parts for its copiers to independent service organizations. In upholding the denial of summary judgment, the Court focused carefully on the potential effects of the defendant's refusal on consumers, *Kodak*, 504 U.S. 473-77, and carefully scrutinized the defendant's arguments that its practices were competitively justified, *id.* at 484-85. Although it recognized that the refusal to sell spare parts might well have been justified by the procompetitive explanations that Kodak put forward, this Court concluded that it simply could not evaluate those justifications "as a matter of law on a record this sparse." *Id.* at 486.

B. The Amended Complaint Alleges Predatory Conduct Under *Aspen and Kodak*

Unlike efficient practices such as price cutting or innovating, Verizon's alleged behavior bears none of the

common earmarks of efficient competition. Trinko alleges that Verizon was attempting to delay or prevent competitive entry into the market by providing inefficient interconnection services to the CLECs' customers. Like the conduct condemned in *Aspen* and *Kodak*, Verizon's alleged conduct directly injured consumers in the short run by limiting their ability to obtain timely local telephone service from the company of their choice.

Verizon's conduct unquestionably inconvenienced consumers who sought local telephone service from a CLEC. Trinko further alleges that the conduct made it extremely difficult for CLECs to compete, which seems obviously true, and that there was no legitimate, procompetitive benefit from Verizon's conduct. J.A. 47 (Am. Compl. 57). Assuming as this Court must that the allegations in the amended complaint are true, and drawing all reasonable inferences therefrom, the conduct alleged is fairly labeled predatory because it restrains competition by inefficiently hindering interconnection, not by cutting price or some other efficient practice.

C. This Court Should Reject The Contention That Verizon's Conduct Can Be Judged Procompetitive As A Matter Of Law

Although Verizon and the United States effectively concede that the challenged conduct injures consumers and restrains the ability of CLECs to compete in the short run, they nonetheless seek dismissal on the pleadings. Both admit, as they must, that this Court's precedents establish that antitrust sometimes requires monopolists to cooperate with rivals. Pet. Br. 17; Gov. Br. 13. They also recognize that Trinko has alleged that Verizon's specific conduct was not justified by any procompetitive effect. J.A. 47 (Am. Compl. 57). They contend, however, that no conceivable set of facts could support that allegation, and the case must therefore be dismissed without any discovery whatsoever.

Curiously, neither Verizon nor the United States explains how frustrating efficient interconnection could possibly be an efficient practice *as a matter of law*, particularly because the local telephone service market cannot function competitively unless the providers are interconnected. Instead, they attempt to cabin the concept of predatory conduct in a way that does not directly refer to consumer interests. Both contend that a refusal to deal may be predatory only when "it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." Gov. Br. 15; Pet Br. 11. In implementing that general standard, the United States essentially contends that only refusals that impose short-run losses on a monopolist can be predatory. Gov. Br. 16. Verizon goes a step further, arguing that even inefficient refusals to deal that have no purpose but to destroy competition are not predatory unless the monopolist has refused to offer one competitor terms that were previously offered to others. Pet. Br. 10. These arguments effectively transform the predatory act requirement from one that looks to consumer interests to one that safeguards business interests. That shift finds no support in this Court's precedents and would undermine the consumer welfare goals that the antitrust laws are intended to advance.

1. *Predatory Conduct That Harms Consumers Cannot Be Saved By Labeling It A Legitimate Business Decision*

Verizon's alleged conduct restrained the CLEC's ability to compete and injured local telephone service consumers by making it difficult for them to switch local carriers. Verizon and the United States argue that the complaint nonetheless fails to state a claim because Verizon's conduct may be characterized as a legitimate business decision. Both Verizon and the Government implicitly assume that conduct that on balance harms consumers may be immunized if it has a legitimate business purpose. That assumption is wrong.

The effect of the defendant's conduct on consumers should be the sole focus of the inquiry. To illustrate, introducing an improved product may drive the producers of older, inferior alternatives from the market and allow the innovator to attain or maintain a monopoly. Nevertheless, that innovator would not violate § 2. There are two analytical paths that lead to that conclusion. The wrong approach, apparently favored by Verizon and the Government, reasons that although innovation has the characteristics of a predatory act—*because it excludes competitors*—it is saved because innovation is a legitimate business practice. The correct approach recognizes that innovation is not predatory in any sense because it benefits consumers, in the short run, by providing a better product, and, in the long run, by spurring additional innovation competition to produce new, competitive alternatives at lower prices.

When the legitimate business justification inquiry is artificially separated from the inquiry into consumer interests, litigants and courts may mistakenly interpret the business justification question as an issue of the fairness of the defendant's business practices. The briefs of both Verizon and the Government are permeated with the notion that it is somehow unfair to compel ILEC's to share their resources in the way that the 1996 Act does. Although that point is debatable, it is also irrelevant to this case. Antitrust is not a code of business ethics designed to protect a monopolist's right to safeguard its supra-competitive profits. The Sherman Act is "a consumer welfare prescription," *NCAA*, 468 U.S. at 107, and therefore the effect of monopolistic conduct on consumers should be the ultimate determinate of whether a defendant has a legitimate reason to engage in conduct that reduces competition. To be sure, a healthy respect for business freedom is appropriate in antitrust cases because the freedom to compete often redounds to the benefit of consumers. But courts must engage the consumer-welfare inquiry; they should not simply assume that monopolists

have a right to refuse to deal irrespective of its effect on consumers.

Here, Verizon and the United States appear to argue that a monopolist's right to run its business as it sees fit justifies its failure to cooperate with competitors. While neither Verizon nor the government clearly explain why that should be so as a matter of antitrust law, presumably they would argue that consumers are better off in the long run if monopolists may refuse to cooperate with rivals to protect their monopoly profits in a way that encourages them to innovate. If the evidence supports the contention that the sort of cooperation sought here would in fact stifle innovation in the local telephone service market to the detriment of consumers, then Verizon should ultimately prevail in this case. The antitrust laws do seek to preserve all consumer-welfare-enhancing rivalry whether it be long-run innovation competition or short-run price competition. At this point, however, there are no facts in the record on which to test Verizon's contention.

2. *Verizon's Conduct Makes No Business Sense In An Interconnected Network Market Except For Its Tendency To Preserve Verizon's Monopoly Power*

Verizon and the Government would define predatory conduct narrowly to include only conduct that "makes no business sense *apart from* enabling monopoly returns" or "conduct necessarily tied to gaining or extending monopoly power." Pet. Br. 11; Gov. Br. 15. As explained above, that standard is faulty for failing to focus on the consumer interests that motivate the antitrust laws. Even assuming, incorrectly, that this approach were proper, it would provide no ground for dismissing this case.

Verizon contends that antitrust liability is inappropriate under its favored standard because violating the duties imposed by the 1996 Act makes business sense irrespective

of its tendency to preserve Verizon's monopoly. Presumably, Verizon contends that this is true because it can earn higher profits by ignoring its duty to efficiently interconnect even if its competitors continue to thrive.

This reasoning is seriously flawed. Local telephone service is a network market in which competitors must be interconnected to provide efficient service to their customers. In such a market, it would only make economic sense for a firm with monopoly power to adopt a policy of undermining the efficiency of the interconnection to inconvenience its competitors' customers. In a competitive market, any firm that attempted to act as Verizon allegedly did would face certain retaliation from its interconnected competitors in the form of poor service for its own customers. The ruinous effect on good will and customer relations would surely make the intentional interference with efficient interconnection a rare event. Only a monopolist that already has virtually all the customers (like Verizon), and hopes to stall competitive entry altogether, would find a scheme like that alleged here to be profitable in an interconnected market.

3. *The United States Mischaracterizes The Predatory Act Inquiry As Requiring The Monopolist To Bear Short-Run Losses*

Citing *Aspen*, the United States insinuates, but never explicitly says, that only conduct that causes the defendant to forgo short-run profits can ever be predatory in a unilateral refusal-to-deal case. Although the defendant in *Aspen* did bear immediate losses, the Court's analysis in that case—as described above—demonstrates that short-run sacrifice is not a threshold requirement for § 2 liability. This Court was most explicit in *Otter Tail Power* where it explained that in monopolization cases "[t]he promotion of self- interest alone does not . . . immunize otherwise illegal conduct." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (internal quotation marks omitted).

As a matter of antitrust policy, requiring an allegation of short-run losses in refusal-to-deal cases would be unwise. Not all conduct that excludes competition on some basis other than efficiency requires the defendant to sacrifice profit. On the contrary, whenever the defendant can increase a rival's costs, and as a result immediately capture additional profitable sales, it may be able to exclude efficient competition without suffering short-run losses. This point is well established in the academic antitrust literature. For example, in a widely cited Yale Law Journal article, antitrust lawyer Thomas Krattenmaker and antitrust economist Steven Salop, both of whom were then at Georgetown Law School, explained that "[r]aising rivals' costs can be a particularly effective method of anticompetitive exclusion [because it] need not entail sacrificing one's own profits in the short run . . . ."[2]

Verizon's refusal to efficiently interconnect, for example, could enable it to retain market share that would otherwise go to a CLEC by blocking or delaying competitive entry. Once a consumer becomes frustrated with its inability to switch to AT&T or another CLEC, its likely course of conduct would be to stay with Verizon. While Verizon's behavior may well increase the price for local telephone service and thus have an inefficient, output-reducing effect overall, the market-share-retention aspect of the restraint could allow Verizon to earn greater profits with its anticompetitive scheme in both the short and long runs. This is a likely result given that local telephone service is a necessity for which consumers have no

[2] Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J. 209, 224 (1986); *see also* Richard S. Markovits, The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook, 63 Tex. L. Rev. 41, 83 (1984) (explaining that "[s]uccessful predatory practices . . . do not necessarily cause a decrease in the predator's output or market share. By driving rivals out or deterring entry, these practices can enable sellers to obtain higher prices without such an adverse result.").

meaningful alternative. (Of course, any conclusion about the elasticity of the local telephone service market is the sort of fact question that needs to be addressed before this case should be ultimately decided on the merits.)

Far from indicating that Verizon's conduct was not predatory, its immediate gains *increase* the likelihood that it would engage in this type of predatory conduct. Anticompetitive schemes that require short-run losses are self-deterring because the monopolist can never be certain that it will be able to recoup its current losses. As this Court has explained, "such schemes are inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition . . . . *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain . . . . For this reason, there is a consensus among commentators that . . . schemes [requiring short-run losses] are rarely tried, and even more rarely successful." *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

By contrast, when a monopolist can restrain competition by imposing costs on a competitor, it can thereby capture more profitable sales for itself immediately. Because this sort of scheme benefits the monopolist in the short run as well as the long run, a monopolist is more likely to attempt it. Defining predatory conduct to require short-run losses by the monopolist would effectively stand the Sherman Act on its head.

4. *Verizon Mischaracterizes This Court's Precedent As Anti-Discrimination Law*

Verizon contends that a monopolization claim for refusing to deal is stated only when a monopolist makes its product available to some competitors, but refuses to make that product available to others on the same terms. Pet. Br. 10 ("This essential circumstance of *discrimination among outsiders as would-be customers seeking the same good at*

the same price is not present in this case." (emphasis in original)).

Putting aside that this Court has wisely never suggested that the Sherman Act encompasses an anti-discrimination principle, Verizon's proposed rule would be counter-productive from an antitrust perspective. If the law required monopolists that open a cooperative channel with one competitor to open the floodgates to all, monopolists would have a strong incentive to avoid procompetitive, cooperative endeavors altogether. As Judge Posner has explained in a related context, if a monopolist knows "that by taking steps to promote competition it would be laying itself open to an antitrust suit . . . it probably would not have taken them. [Allowing a § 2 case to go forward on that ground] would thus undermine the objectives of antitrust law." *Olympia Equipment Leasing v. Western Union Telephone Co.*, 797 F.2d 370, 377-79 (7th Cir. 1986). The effects of a refusal to deal on consumers, not the relative treatment of different competitors, must be the yardstick by which monopolization cases are measured.

5. *Permitting This Case To Proceed To Discovery Would Not Threaten Consumer Interests*

Both Verizon and the Government stress that the antitrust laws should *not* be applied in a way that creates an inappropriate incentive for firms to pull their competitive punches. Pet. Br. 23; Gov. Br. 16. That can happen if vigorous antitrust enforcement is brought to bear in an attempt to root out highly speculative anticompetitive conduct that is difficult to distinguish from procompetitive behavior. Predatory pricing is the classic example. Competitive price cuts are hard to distinguish from predatory ones. If predatory pricing claims are too easy to prove, law abiding firms may compete less vigorously in order to avoid the threat of an antitrust case or investigation. As then-Judge Breyer explained, and this Court later recognized, "we must be

concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)).

The government urges the Court to extend the cautious approach applied in predatory pricing cases to unilateral refusal-to-deal cases. Consumers might lose the benefits of vigorous competition, it argues, if monopolists felt compelled to cooperate with inefficient rivals to avoid the expense of defending an antitrust case. Although the United States is right to urge caution in refusal-to-deal cases, its proposed rule of *per se* legality whenever a monopolist does not incur short-run losses finds no support in the case law and would permit too much anticompetitive behavior to slip beneath the radar screen.

This Court has repeatedly shunned the sort of *per se* rule suggested by the Government here. "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Kodak*, 504 U.S. at 466-67 (quoting *Maple Flooring Manufacturers Assn. v. United States*, 268 U.S. 563, 579 (1925)). Even in situations less likely to result in consumer harm than the one at issue here, the door to potential liability has invariably been left open. For example, this Court has rejected *per se* liability for many vertical agreements while permitting antitrust scrutiny under the Rule of Reason.[3] Similarly, in predatory pricing cases this Court

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[3] *NYNEX v. Discon*, 525 U.S. 128, 135 (1998) (recognizing that a decision to enter a vertical supply agreement with one supplier rather than another could violate antitrust laws if plaintiff could prove "harm, not just to a single competitor, but to the competitive process"); *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (emphasizing "we of course do not

has required proof of a reasonable likelihood that the defendant would be able to recoup its losses, a necessary prerequisite to any consumer injury, but it has shunned rules that would impose *per se* legality for low pricing behavior that is unlikely to cause consumer harm.[4]

To justify the sort of rule the United States urges upon this Court, a defendant would be required to show that a monopolist's refusal to deal "always or almost always . . . enhance[s] competition." *Kodak*, 504 U.S. at 479. Particularly given Congress's explicit finding in the Telecommunications Act of 1996 that interconnection in local telephone service would benefit consumers, Verizon simply cannot meet that heavy burden. In this sense, Trinko's allegations are similar to those in *Kodak*. There, the Court rejected an analogy between a refusal to sell spare parts to ISOs and predatory pricing. "Because cutting prices to increase business is 'the very essence of competition,'" this

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hold that all vertical maximum price fixing is per se lawful . . . [it] should be evaluated under the rule of reason"); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (explaining that "[w]hen anti-competitive effects are shown to result from particular [non-price] vertical restrictions they can be adequately policed under the rule of reason").

[4] *See, e.g., Brooke Group v. Brown & Williamson*, 509 U.S. 209, 229 (1993) ("A predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as one designed to bring about a monopoly. However unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability . . . . We decline to create a *per se* rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopoly pricing."); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121 (1986) ("the United States invites the Court to adopt in effect a *per se* rule 'denying competitors standing to challenge acquisitions on the basis of predatory pricing theories.' . . . We decline the invitation.").

Court reasoned, "mistaken inferences would be 'especially costly' and would 'chill the very conduct the antitrust laws are designed to protect.'" *Id.* at 478. But Kodak's conduct, like Verizon's here, was "just the opposite." *Id.* Far from benefitting consumers as lower prices would, Kodak's higher service prices and market foreclosure of ISOs had an immediate negative impact on consumers. It limited their choice of service providers and likely required them to pay higher prices for service.

Verizon's failure to provide efficient interconnection has the same negative impact on consumer choice and price. In each case, the challenged conduct "is facially anticompetitive and exactly the harm that antitrust laws aim to prevent." *Id.* The balance this Court struck when evaluating *Kodak*'s refusal to sell parts to ISO's is thus equally appropriate here: "when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment." *Id.* at 479

D. The Telecommunications Act Of 1996 Strengthens Trinko's Monopolization Claim

Both Verizon and the United States correctly conclude that the 1996 Act does not preempt the application of the antitrust laws to this market. Pet. Br. 35; Gov. Br. 6. Nevertheless, Verizon all but takes back its concession, by contending that the involvement of regulators in local telephone service makes antitrust liability inappropriate here. Pet. Br. 12. Far from blocking antitrust scrutiny, the procompetitive goals of the 1996 Act weigh in favor of finding antitrust liability in this case.

1. *Regulatory Review Does Not Supplant Antitrust Review*

As an initial matter, Verizon's claim that the regulatory oversight created by the 1996 Act is so pervasive that

antitrust review is unnecessary cannot be squared with the Act's antitrust savings clause. In declaring that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws," 47 U.S.C. § 152, Congress could not have been clearer in its intent to preserve antitrust duties alongside the obligations imposed by the 1996 Act.

Even putting the savings clause aside, however, this Court has never held that a regulatory system designed to further consumer-welfare-enhancing competition—the very same goal that the antitrust laws pursue—could preempt antitrust scrutiny. As Congress described it, the purpose of the Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub.L. No. 104-104, 110 Stat. 56, 56 (1996).

The regulatory schemes examined by this Court in the past pursued social policy goals other than competition, such as market stability and equal access. *Cf. Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 689 (1975) (explaining that antitrust focuses solely on consumer welfare while the Securities and Exchange Commission "must consider, in addition, the economic health of the investors, the exchanges, and the securities industry."). These cases rested on the assumption that regulators charged with the duty to balance those competing goals should be allowed to do their work without interference by the courts.[5] By contrast, the 1996 Act places only procompetitive, consumer-welfare-maximizing goals on the table. Courts have long applied those goals in complex antitrust cases, so there is no reason to preempt

[5] Steven Semeraro, The Antitrust-Telecom Connection, 40 San Diego L. Rev. 555, 588-90 (2003).

antitrust scrutiny of cases arising under the 1996 Act simply because regulators also have a role to play.[6]

Even if the 1996 Act required the sort of balancing between competitive and non-competitive goals required by prior regulation—which it does not—preemption would be nonetheless inappropriate here. In deciding whether to apply antitrust to a regulated industry, this Court has long focused on whether regulators, as opposed to private parties, in fact call the competitive shots. It has compared this quintessentially factual question to "causation inquiries," because judges must ask whether regulators play "a substantial role in determining the specifics of the economic policy." *FTC v. Ticor Title Ins.*, 504 U.S. 621, 633 (1992). Justice Douglas, a former regulator himself, emphasized the point in his concurring opinion in *Gordon v. New York Stock Exchange, Inc.*: "The mere existence of a statutory power of review by the SEC . . . cannot justify immunizing [broker conduct] from antitrust challenges . . . . Only if the SEC is actively and aggressively exercising its powers of review and approval can we be sure that [the challenged conduct is] being monitored in the manner which Congress intended." 422 U.S. 659, 691-92 (1975) (Douglas, J., concurring).

Verizon says that administrative scrutiny under the 1996 Act is pervasive enough to guard against anticompetitive behavior by ILECs. Conversely, however, at the time the 1996 Act became law, top officials at the United States Department of Justice, Antitrust Division, expressed serious questions about the likely effectiveness of the regulator's remedial powers. In late-1997, then-Assistant Attorney General Joel Klein expressed concern that "the Act itself calls for no real penalties for non-compliance . . . ."[7] More

[6] *Id.* at 590-91.

[7] Joel I. Klein, The Race for Local Competition: A Long Distance Run, Not a Sprint 6-7 (Nov. 5, 1997) (available at http://www.usdoj.gov/atr/public/speeches/1268.htm).

recently, a former Senior Counsel to the AAG echoed Klein and raised the possibility that ILECs may come to view regulatory fines as a cost worth bearing to retain their monopoly position.[8] Given these concerns, the sufficiency of regulatory supervision under the 1996 Act is a fact question not amenable to resolution on the pleadings. *Cf. Gordon*, 422 U.S. at 687 (stressing that a court appropriately refuses to exempt regulated conduct from antitrust scrutiny where there is "no *evidence* presented regarding the extent of [regulatory] review . . . ."(emphasis added)).

2. *The 1996 Act Should Weigh In Favor Of Finding Antitrust Liability*

Even when economic regulation does not supplant antitrust review, it affects the competitive conditions that producers face. As the late Philip Areeda and Herbert Hovenkamp have explained, "antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation." IA Philip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 240c3 (1997). Traditional regulatory regimes may increase a plaintiff's burden in an antitrust case, because a regulated entity may find it more difficult to exercise market power in pricing, for example, if its prices are subject to regulation. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990).

But regulation is not a one way ratchet. In appropriate cases, the existence of a regulatory duty may enable courts to confidently condemn conduct under the antitrust laws that might otherwise be too hard to distinguish from pro-competitive behavior. Regulation does not transform lawful conduct into unlawful conduct. But it does play a role in the

[8] Philip Weiser, Federal Common Law, Cooperative Federalism, and The Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692, 1757-60 (2001).

evidentiary inquiry into whether a court should prohibit a certain practice in a particular industry. *Cf. Otter Tail Power*, 410 U.S. at 381 (relying on need for Commission approval of interconnection in upholding antitrust judgement).[9]

With respect to a unilateral refusal to deal in an unregulated market, courts must take care not to over-deter anticompetitive refusals and thereby chill vigorous competition by monopolists. As *Aspen* and *Kodak* make clear, all unilateral refusals in unregulated markets cannot escape antitrust scrutiny. Nevertheless, courts proceed with extreme caution. Where, as here, however, Congress has determined that a particular type of cooperation—interconnection and the provision of certain local telephone services—will enhance consumer welfare by enabling competition to emerge more quickly, courts can more confidently apply the antitrust laws to a monopolist's refusal to deal that transgresses the regulatory requirement. The monopolist does not violate the Sherman Act because it breaches a regulatory duty, but courts should not ignore Congress's views about the types of cooperation that will enhance consumer welfare when inquiring into the legality of the monopolist's refusal. In this light, the 1996 Act essentially constitutes a legislative finding that interconnection in local telephone service is necessary to enable competition to serve its usual consumer-welfare-enhancing function. Courts should respect that finding, if not defer to it.

The Seventh Circuit reached much the same conclusion in *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), a case that was instrumental to introducing competition into the long distance telephone service market. MCI alleged, and the jury imposed, antitrust liability on AT&T for refusing to permit *multipoint*

[9] *See also* Philip J. Weiser, Goldwasser, The Telecom Act and Reflections on Antitrust Remedies, 55 Admin. L. Rev. 1 (2003).

interconnection. This type of interconnection would have enabled MCI to reach AT&T's customers in cities where MCI had no facilities of its own. But the FCC had not ordered AT&T to interconnect in this way. Although the Seventh Circuit upheld antitrust verdicts against AT&T for failing to interconnect in regions where MCI had facilities, and the FCC had previously ordered AT&T to interconnect, the court overturned the multipoint verdict.

Verizon cites this holding as support for its argument that antitrust liability cannot exist here. Pet. Br. 42. In fact, however, the Seventh Circuit's reasoning supports the opposite result in this case. In overturning the jury's verdict for MCI, the court carefully explained that AT&T's refusal to provide multipoint interconnection was not actionable *because the FCC had never required it.* If the FCC had mandated multipoint interconnection as a regulatory duty, and AT&T had refused, the Seventh Circuit could have more confidently concluded that cooperation of that sort was procompetitive and permitted the verdict to stand. *Id.* at 1149.

Here, of course, the 1996 Act does require Verizon to provide the interconnection services that Trinko alleges it did not provide. Because Congress imposed that obligation on ILECs like Verizon specifically to enhance competition in local telephone service, the amended complaint states a § 2 claim.

3. *The 1996 Act Does Not Create Anticompetitive Duties*

Verizon suggests that—despite Congress's intention to open local telephone service to competition—the duties it imposed are actually inconsistent with the antitrust laws in large part because they impose on ILECs a brand new duty to share their resources at "heavily discounted prices." Pet. Br. 2. Although the conduct required by the 1996 Act may be new to the historically monopolistic local telephone service

market, it is hardly unheard of in the comparable, but competitive, long distance market. Interconnection, bulk sales of capacity, and the shared use of local loops and other network elements have all been commonplace in that market. It is certainly permissible to presume at the pleading stage that practices that flourish in a competitive market will also prove to be procompetitive in a comparable, but as yet monopolistic market, when competition is introduced there. Indeed, the Court made exactly that point in *Aspen*, explaining that cooperation among ski operators to offer all-mountain lift tickets in competitive ski markets was sufficient evidence to enable a jury to conclude that cooperation of that type is efficient. *Aspen*, 472 U.S. at 603. At the end of the day, Verizon may be able to show that the duties imposed by the 1996 Act are different in significant ways from the similarly appearing common practices in the long distance market. At this point, however, it certainly does not contradict antitrust principles as a matter of law to uphold duties that can be expected to hasten the demise of the vestiges of monopoly control in the local service market.

Verizon also questions whether courts can administer regulatory duties and implement pricing standards. Permitting a monopolization claim based on frustrating the interconnection required by the 1996 Act as alleged in this case, however, would hardly compel the court to administer the 1996 Act. With respect to liability, the standards of the Sherman Act, not those of the 1996 Act, must control. Further, courts would be required to carefully tailor any injunctive remedy so as not to interfere with regulatory activity. Punishing Verizon for intentionally undermining interconnection efforts, and ordering it not to engage in that improper conduct going forward, would not embroil the courts in pricing or other regulatory issues.

As for Verizon's concern with price levels, discounted prices benefit consumers and thus do not usually conflict with

the antitrust laws. Mandated prices that are too low could theoretically harm consumers by forcing a producer to lower quality and blunting its incentives to innovate. Whether the prices required by the 1996 Act in the local telephone service market are low enough to have these anti-consumer effects is a distinctly factual question that cannot be resolved on the pleadings. The language of the statute, and litigation to date, however, strongly suggest that the prices charged under the 1996 Act are not anticompetitively low. Congress instructed regulators to take account of "technological advancement" as well as "vigorous economic competition." 47 U.S.C. §257(b). More specifically, Congress required cost-based rates for network elements that may include a reasonable profit, 47 U.S.C. § 252(d)(1), and a wholesale rate for bulk sales of local telephone service that backs out only those costs avoided by the ILEC when selling capacity in bulk, 47 U.S.C. § 252(d)(3). Neither of these standards seems likely to produce rates so low as to compromise quality or innovation, particularly given the outcome of judicial review of the methodologies adopted by the FCC. *Verizon v. FCC*, 535 U.S. 467, 497-528 (2002) (upholding standard for pricing unbundled network elements as consistent with statutory language); *Iowa Utilities Bd v. FCC*, 219 F.3d 744, 754-56 (8th Cir. 2000) (holding that ILEC must discount bulk sale rate under the 1996 Act only by amount of costs actually avoided), *rev'd in part on other grounds*, *AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999).

Lastly, Verizon contends that pure resale arrangements provide little benefit to consumers because they introduce competition only in the marketing of the service. Pet. Br. 30. In certain industries, marketing competition may provide significant consumer benefit. And even if re-selling provided only minimal benefits, it might well enable faster and more wide-spread entry that would hasten consumer-welfare-enhancing facilities-based competition. At a minimum, Trinko is entitled to the presumption at the pleading stage that

Congress knew what it was doing in mandating the sale of local service in bulk as one tool to stimulate competition in local telephone service.

II. NEITHER THE ESSENTIAL FACILITIES NOR MONOPOLY LEVERAGING DOCTRINES ARE AT ISSUE HERE

Verizon and the United States make much of the Court of Appeals' references to the so-called essential facilities and monopoly leveraging doctrines. The amended complaint, however, does not overtly rely on either type of claim, and there is no reason for this Court to address it here.

To the extent that Verizon and the Government intend to argue that generic monopolization tests untied to the competitive conditions in a particular industry may yield erroneous results, they make a valid point. This Court has made clear that to properly evaluate a non-*per se* antitrust claim, judges must make "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," and then "explain the logic of their conclusions . . . to subject . . . [them] to others' critical analyses . . . ." *California Dental Ass'n. v. FTC*, 526 U.S. 756, 780-81 (1999). Simply applying the elements of the essential facilities or monopoly leveraging doctrines woodenly without examining the likely competitive effects of a particular restraint in a particular market would no doubt yield bad results in some cases. For example, the sharing of a facility that cannot reasonably be duplicated may have anticompetitive effects if it adds administrative costs but no cost savings. Forced sharing may be procompetitive, however, if it enables efficient competition that would not otherwise result. In the local telephone service market in which interconnection is a necessary component of efficient competition, the forced sharing of the facilities necessary for interconnection is likely to be pro-competitive. Once again, however, that issue requires a factual record that is simply not present at this juncture.

Similarly, leveraging monopoly power from one market to another may benefit consumers by stimulating competition in the second market. In other cases, it may distort market behavior in ways that could reduce consumer welfare. The allegations in this case indicate that Verizon is maintaining its monopoly power in the retail market for local service, rather than leveraging that power in an attempt to gain some advantage in the wholesale market. At least at this early stage, leveraging would appear to have no role to play in this case.

In appropriate cases, the essential facilities and monopoly leveraging doctrines may provide useful tools to a court engaging in an appropriately careful market-specific analysis. Certainly nothing in this case, or in the recent circuit court law more generally, would justify this Court taking up either doctrine without a developed record on which to judge its application to a particular set of facts.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the United States Court of Appeals for the Second Circuit and remand this case for the development of a record sufficient to address the antitrust claims raised by the amended complaint.

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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR ALLEGIANCE TELECOM, INC., ATX COMMUNICATIONS, INC., FOCAL COMMUNICATIONS CORP., ICG COMMUNICATIONS, INC., PAC-WEST TELECOMM, INC., AND US LEC CORP. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Amici will address: (1) whether persistent disruptions by a monopolist of the wholesale service it sells to competitors, where the disruptions impair the retail service the competitors provide to their customers, and where the customers can be expected to—and do—blame the competitors for the retail service problems, are fairly characterized as simply a passive refusal to deal by the monopolist;

(2) whether, if the allegations in this case are analyzed as a refusal to deal, long-standing antitrust precedent should be overturned, and a monopolist should be permitted unreasonably to refuse to do business with a competitor even if the refusal prevents competition and is not demonstrated to be part of any procompetitive business strategy;

(3) whether, despite the express antitrust savings clause in the Telecommunications Act of 1996, 47 U.S.C. § 152 note (§ 601(b), 110 Stat. 143) and the absence of "plain repugnancy" between that statute and the antitrust laws, incumbent telephone monopolists should be excused from compliance with Section Two of the Sherman Act, 15 U.S.C. § 2.

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IN THE

Supreme Court of the United States

No. 02-682

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR ALLEGIANCE TELECOM, INC., ATX COMMUNICATIONS, INC., FOCAL COMMUNICATIONS CORP., ICG COMMUNICATIONS, INC., PAC-WEST TELECOMM, INC., AND US LEC CORP. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE* [1]

Amici curiae Allegiance Telecom, Inc., ATX Communications, Inc., Focal Communications Corp., ICG Communications, Inc., Pac-West Telecomm, Inc., and US LEC Corp. are competitive telephone companies known as competitive local exchange carriers, or "CLECs," that seek to compete with

[1] No one other than the named *amici* wrote this brief in whole or in part, or made any monetary contribution to its preparation. Both parties have filed blanket consents to the filing of *amicus* briefs.

incumbent monopoly telephone companies, or "ILECs," in markets for local telephone service throughout the United States. Although no CLEC is a party to this case, *amici* and other CLECs may be profoundly affected by its outcome. Some *amici* are currently litigating monopolization claims against ILECs, including Verizon Communications Inc. ("Verizon"). All *amici*, including those not currently involved in antitrust litigation, have a strong interest in ensuring that the antitrust laws continue to govern business conduct in local telephone markets. *Amici* will provide the Court with the CLECs' perspective on the hostile environment for competition in local telephone markets today, the ineffectiveness of regulation alone in preserving competitive conditions, and the antitrust standards that should constrain anticompetitive conduct by the incumbent monopolists.

As six of the most experienced CLECs in the nation, *amici* compete with and purchase services from ILECs, including Verizon. All *amici* serve retail customers. ATX, ICG, and Pac-West trace their origins to the mid-1980s and the telecommunications revolution sparked by the divestiture of AT&T's long-distance and equipment affiliates from its local service operations. Allegiance, Focal, and US LEC were founded shortly after passage of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("'96 Act"). Today Allegiance, Focal, and ICG operate in markets around the country. US LEC concentrates its operations in the southeast and the mid-Atlantic regions, ATX operates in the midwest and on the East Coast, and Pac-West operates on the West Coast.

Although each *amicus* has a different business model, all are in part facilities-based, meaning that they utilize some of their own equipment and facilities in serving customers, while at the same time seeking to use some equipment and facilities (particularly last-mile facilities) of the incumbent monopolist. The competition they seek to bring to the

marketplace can only survive where unreasonable conduct that preserves monopoly power, and that lacks a legitimate business justification, is prohibited.

SUMMARY OF ARGUMENT

1. The conduct alleged in this case is not simply a passive refusal to deal, but affirmative activity by a monopolist creating a public misperception that its competitors' service is technically deficient. The complaint alleges that Verizon has repeatedly mishandled various aspects of wholesale service to CLECs, with the result that CLEC retail customers, including the plaintiff, receive inadequate service. Verizon/Trinko Joint Appendix ("J.A.") at 19, 29. In the experience of *amici*, ILEC disruptions of wholesale service are common and frequently in turn disrupt telephone service to CLEC retail customers. When this occurs, CLEC customers conclude that the fault lies with their CLEC provider; they do not blame the ILEC. All *amici* have lost customers as a result of ILEC wholesale service interruptions that their customers attributed to *amici*. Framing the issue in this case as no more than a passive refusal to deal ignores the allegations of affirmative mishandling of wholesale business by Verizon, mishandling that impairs the ability of Verizon's competitors to compete effectively and preserves Verizon's monopoly power.

2. The complaint alleges that Verizon lacks a legitimate business justification for its conduct, J.A. at 29, an allegation that must be accepted as true for the purposes of Verizon's motion to dismiss. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The justification Verizon has advanced, even if proved, would not satisfy the legal standard under Section 2 of the Sherman Act, 15 U.S.C. § 2. Section 2 condemns unreasonable unilateral conduct by a monopolist that: (1) preserves monopoly power, and (2) does not make business sense for the monopolist but for its exclusionary effects, *i.e.*, does not improve the

monopolist's efficiency or the price or quality of its products. *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (*en banc*). Verizon suggests that the course it pursued was more profitable than less exclusionary conduct would have been, Brief for Petitioner ("Verizon Br.") at 26, but without more this does not qualify as a procompetitive justification and thus fails the test. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601-05 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973); *Lorain Journal Co. v. United States,* 342 U.S. 143, 155 (1951); *Microsoft,* 253 F.3d at 59. Monopoly is inherently more profitable than competition, and increased profits alone cannot be a defense to a charge of illegal monopolization. This principal applies to all § 2 cases, including those in which the specific conduct alleged is an unreasonable refusal to deal or denial of access to essential facilities. *United States v. American Tel. & Tel.*, 524 F. Supp. 1336, 1360-61 (D.D.C. 1981).

3. Congress expressly directed that the antitrust laws continue to govern local telephone markets by including an antitrust savings clause in the '96 Act. 47 U.S.C. § 152 note (§ 610(b), 110 Stat. 143). Moreover, the '96 Act and its associated regulations are intended to encourage competition, and thus are parallel in purpose to the Sherman Act. 47 U.S.C. §§ 251(c), 252, 271; *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (Sherman Act is a "comprehensive charter of economic liberty"). Where there is no "plain repugnancy" between a regulatory scheme and the antitrust laws, the antitrust laws are presumed to apply, even in the absence of an express savings clause. *E.g., United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 351 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963); *Southern Pac. Communications Co. v. American Tel. & Tel.*, 740 F.2d 980, 999 (D.C. Cir. 1984). To nevertheless excuse Verizon from compliance with the Sherman Act would depart from long-standing United States practice

regarding the treatment of regulated industries in general and the telecommunications industry in particular, and would flout Congressional intent.

ARGUMENT

I. VERIZON'S ARGUMENT IS BASED ON A FACTUAL CLAIM THAT CANNOT BE DECIDED ON A MOTION TO DISMISS

A. Incumbent Telephone Companies, Including Verizon, Retain Monopoly Power In Local Markets Everywhere, While Facing A Chorus Of Charges Of Anticompetitive Conduct

Seven years after passage of the '96 Act, monopoly remains ubiquitous in markets for local telephone service throughout the United States. With the exception of a handful of urban centers, in no area do the incumbent's customers purchase less than 70% of local lines, while the uniform experience of CLECs, including *amici*, is that successful, effective entry is extremely difficult. *See* Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2002,* Table 6 (June 12, 2003), *at* http://ftp.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0603.pdf. Numerous CLECs entered local markets in the wave of optimism created by the '96 Act, but more than 50 have now declared bankruptcy, and of over 300 facilities-based CLECs in business in 1999, only about 100 remain. Jeffrey A. Eisenach, *The Real Telecom Scandal*, Wall Street Journal (September 30, 2002); Association for Local Telecommunications Services, *The State of Local Competition 2003* (April 2003).

Of course, possession of monopoly power is not illegal unless the power was created or preserved by anticompetitive conduct. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992); *United States v. Griffith*, 334 U.S. 100, 107 (1948). However, many ILECs, including

Verizon, face serious allegations that they owe their continuing monopolies to anticompetitive behavior. For example, CLECs have formally alleged that Verizon has: (1) advised a CLEC and regulators that its conversion processes were reliable, then disrupted service to hundreds of CLEC customers when converting their service from resale to the CLEC's switch, First Amended Counterclaim, *Verizon Communications Inc. v. ATX Communications, Inc.*, No. 02-1374 (SLR) (D. Del. filed May 12, 2003) (pending); (2) without warning, terminated long distance access for numerous former Verizon customers that had decided to switch to a CLEC, *Verizon New Jersey, Inc. v. Ntegrity Telecontent Servs., Inc.*, 219 F. Supp. 2d 616, 630 (D.N.J. 2002) (complaint dismissed); and (3) repeatedly and without warning, failed to make wholesale service available on the dates promised, forcing a CLEC to notify its customers that installation of their retail service would be delayed, thereby causing the CLEC to lose business and damaging its reputation. Compl. ¶¶ 141-45, *Covad Communications Co. v. Bell Atlantic Corp.*, No. 1:99-CV-01046 (D.D.C. filed July 5, 2001) (stayed D.C. Ct. App.). Many CLEC antitrust claims have been interpreted, like the plaintiff's claims in this case, as an allegation that the ILEC's conduct is tantamount to an unreasonable refusal to deal with CLECs. As in this case, however, often the conduct alleged was not mere passive refusals, but affirmative actions that damaged CLEC reputations and thereby preserved ILEC monopolies.

In the past, markets for telephone equipment and long-distance service have been well-served by effective antitrust enforcement, to the great benefit of American commerce. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd, Maryland v. United States*, 460 U.S. 1001 (1983). Today, a number of companies seek to bring competition to local service markets, but they can do so if only antitrust law prohibits incumbents from blocking effective entry.

B. Verizon's Claim That Its Conduct Makes Procompetitive Business Sense Raises A Question Of Fact That Cannot Be Resolved On This Motion To Dismiss

The plaintiff alleges that Verizon has dealt with competitors in unreasonable ways that disrupt their operations, thereby impeding their ability to compete effectively. J.A. at 29-30. Verizon says that its conduct makes business sense independently of its exclusionary effects. Verizon Br. at 26. This is a factual claim that cannot be resolved on a motion to dismiss. The complaint alleges that Verizon has "no legitimate business purpose" or "valid business reason" for its conduct, J.A. at 29, that it has attempted to exclude rivals "on a basis other than efficiency," *id.*, and that its conduct is "unnecessarily restrictive." *Id.* There is no record evidence and not even a formal pleading to the contrary. For purposes of this motion, the plaintiff's allegations must be accepted as true. *Hishon v. King & Spaulding*, 467 U.S. at 73; *Scheuer v. Rhodes*, 416 U.S. at 236; *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 38 (D.C. Cir. 2000); *Turbe v. Gov't of the Virgin Islands*, 938 F.2d 427, 428 (3rd Cir. 1991).

II. THE ALLEGED CONDUCT GOES BEYOND REFUSALS TO DEAL, AND AMOUNTS TO AFFIRMATIVE DISRUPTION OF COMPETITION

The allegations in the complaint in this case, as with many other pending antitrust complaints against ILECs, assert much more than passive refusals to do business. The issue is whether Verizon disrupted wholesale service to its competitors, impairing aspects of their retail service to their customers in the process. *See, e.g.*, J.A. at 19. Verizon's misconduct allegedly occurred often enough and in so many forms that it made it difficult for competitors to compete effectively, J.A. at 29, thereby preserving Verizon's monopoly power.

In *amici*'s experience, when customers encounter unfamiliar service problems upon switching to CLEC service, they conclude that the fault lies with the CLEC. After all, most faced no similar service problems when they obtained service from an ILEC. When the service interruptions are serious, CLEC competition is weakened. Some customers remain with their CLEC but tell others of the technical problems they have encountered, discouraging potential customers from purchasing CLEC service. Some require CLECs to grant them credits or provide expensive work-arounds, such as free cellular telephones and air time until their CLEC landline service is finally in place. CLECs usually must absorb these costs and the accompanying administrative burdens, which distract them from their efforts to build their businesses. Some customers promptly switch back to ILEC service, again telling others of their unhappy experiences with a CLEC. Thus, by repeatedly and significantly disrupting the wholesale service it provides to CLECs and thereby impairing the retail service they can provide, an ILEC can preserve its monopoly power.

III. UNDER WELL-ESTABLISHED ANTITRUST STANDARDS, WHERE A MONOPOLIST'S UNREASONABLE CONDUCT PRESERVES ITS MONOPOLY POWER, THE CONDUCT VIOLATES § 2 UNLESS IT MAKES PROCOMPETITIVE BUSINESS SENSE INDEPENDENTLY OF ITS EXCLUSIONARY EFFECTS

A. Even If Proved, Verizon's Assertions Are Legally Insufficient

Unreasonable conduct by a monopolist that preserves its monopoly power violates § 2 of the Sherman Act unless it makes business sense for the monopolist independently of its exclusionary effects. *See Microsoft*, 253 F.3d at 59. On this motion to dismiss, Verizon implicitly concedes the first

element of this standard, that it preserves its monopoly power by dealing with CLECs in disruptive ways that prevent them from competing effectively, or by refusing to deal with them at regulated, compensatory rates. Verizon points out that its choice is between selling functional wholesale access that a CLEC can utilize in serving a retail customer, and selling retail service to the same customer itself. Verizon Br. at 26 n.23. In other words, if Verizon refuses to sell functional wholesale access to CLECs, retail customers—even if they prefer to obtain service from a CLEC—will be forced to turn to Verizon instead. Unless Verizon leases CLECs functional access to its network, especially the last mile,[2] there can be no effective competition in the provision of local telephone service.

The antitrust inquiry then turns to whether the challenged conduct makes legitimate business sense apart from its exclusionary effects. Verizon suggests that it earns higher profits by excluding CLECs. Verizon Br. at 26 n.23. But the relevant antitrust question is not *whether* the monopolist will earn more through the exclusionary conduct, since monopoly power generally increases profits. The question is *how* it will earn more: does the conduct enhance the monopolist's returns by enabling it to improve the price or quality of its service, or to improve the efficiency of its internal operations? *Microsoft*, 253 F.3d at 59. If so, the conduct will produce higher profits for the monopolist even apart from its effects in preserving monopoly power, and the monopolist will have preserved its market position through competition on the merits. But if the conduct provides no such procompetitive

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[2] While *amici* and some other CLECs are in part facilities-based, it is not now and will not in the foreseeable future be feasible for CLECs to build out their networks to cover the "last mile" between most customers and the nearest call distribution point, called an "end office" or "central office."

benefit, it does not make business sense except by depriving customers of choice.

As expressed by the unanimous *en banc* D.C. Circuit:

> . . . if a plaintiff successfully . . . demonstrat[es] anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct. If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim.

Microsoft, 253 F.3d at 59 (citations omitted). And the First Circuit has held:

> . . . a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons for an otherwise exclusionary refusal to deal, while the desire to maintain a monopoly market share or thwart the entry of competitors would not.

Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994).

The notion that self-interest is a sufficient justification has been expressly rejected by this Court:

> 'The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct.' [The Sherman] Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail . . . sought to substitute for competition anticompetitive uses of its dominant economic power.

Otter Tail, 410 U.S. at 380 (citations omitted). Similarly, the Third Circuit has recently held that:

> . . . a defendant's assertion that it acted in furtherance of its economic interests does not constitute the type of business justification that is an acceptable defense to § 2 monopolization. Paraphrasing one corporate executive's well-publicized statement, whatever is good for [the company] . . . is not necessarily permissible under § 2 of the Sherman Act.

LePage's Inc. v. 3M, 324 F.3d 141, 163 (3d Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3007 (U.S. June 20, 2003) (No. 02-1865).

Verizon has not explained how its conduct has increased its profits other than by forcing retail customers that would have preferred to purchase telephone service from a CLEC to purchase service from Verizon instead. Verizon has not described any way in which its conduct makes its products and services better or less expensive, or makes its internal processes more efficient. Thus, it has utterly failed to address the standard for evaluating unreasonable monopoly conduct that excludes competition.

The "makes business sense apart from exclusion" test is designed to ensure that a monopolist is able to compete aggressively, on the merits, to preserve its market position. *Microsoft*, 253 F.3d at 58-59. The test allows a monopolist to conduct its business in any way that is both rational and procompetitive, even if its success in that course of action protects and preserves its monopoly power. Consumers benefit if the monopolist is permitted to compete in procompetitive ways along with its smaller competitors, who by dint of their lack of market power usually cannot compete in any other manner. The standard only prohibits a monopolist from unreasonably excluding rivals "on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605, quoting Robert Bork, *The Antitrust Paradox* 138 (1978).

The standard does not, however, insulate conduct for which *any* business justification, no matter how negligible, can be

constructed, despite extreme language proposed by Verizon and some *amici* writing on its behalf. The fact that exclusionary conduct results in a minor savings for the monopolist would not protect the conduct if costs greater than those savings also result, that is, the conduct would not would be profitable *overall* absent its monopoly-preserving effects. Since it is possible to imagine some minor savings arising from virtually any type of business conduct, a standard that would permit any such savings, no matter how insignificant, to excuse exclusionary conduct would in practice free a monopolist from any antitrust constraint. Moreover, reliance on even insignificant savings would depart from the principle of protecting rational business behavior, since rational business people do not pursue an expensive course of action simply because of a minor associated benefit. The appropriate legal standard is whether the conduct is procompetitive and profit-maximizing overall. Thus, a rule that only conduct that makes *no* business sense apart from its competition-restricting effects can be challenged under § 2, if applied literally, would deny consumers antitrust protection from much monopolistic behavior and would reach well beyond the goal of protecting monopolists' ability to compete in rational, procompetitive ways.

1. *Unreasonable Refusals To Deal Are Judged By The Same "Procompetitive Business Sense" Standard As Other Exclusionary Conduct That Preserves Monopoly Power*

Verizon treats this case as one involving refusals to deal. Verizon Br. at 17-20. Refusal-to-deal precedent applies the same "procompetitive business sense" standard as other §2 cases described above. Where the refusals are unreasonable and preserve monopoly power, they are suspect, since in the absence of restraints on competition, companies generally want to maximize their sales in order to maximize their profits. *Olympia Equip. Leasing Co. v. Western Union Tel.*

Co., 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.).[3] Thus, the examination of a proffered procompetitive justification must be a careful one.

In *Aspen Skiing*, the absence of a procompetitive, efficiency-based justification was decisive. A ski resort monopolist owning three slopes in Aspen ceased selling a six-day lift ticket in conjunction with its rival, which owned the remaining slope in Aspen. The joint ticket had enabled the holder to ski on any of the four Aspen slopes on each of six days. While the Court examined the monopolist's prior participation in the joint ticket, this history was important solely because the prior course of conduct was evidence of where the monopolist's legitimate business interests lay. The Court also emphasized the fact that in competitive ski markets, joint tickets are common. The Court looked to whether there was an efficiency-based justification for the defendant's refusal to participate in the joint ticket, and found the jury's negative answer to be supported by the evidence. The Court's articulation of the governing standard emphasized that the efficiency of the challenged conduct is determinative, and liability attaches where the defendant is not driven by "efficiency concerns and . . . [is] willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." 472 U.S. at 610-11.

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[3] Refusals to deal that are not unreasonable—such as refusals to sell below cost or to sell in furtherance of a scheme to defraud—cannot form the basis of § 2 liability. *See, e.g., Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980) (deceptive character of plaintiff's real estate listings a valid reason for refusal to publish advertisements). The sales involved in this case, however, were at regulated rates, already held by the FCC (and in the case of TELRIC rates, by this Court) to be reasonably compensatory. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

The monopolist Aspen Skiing was in a position similar to that of Verizon here: by refusing to sell joint tickets, Aspen Skiing could force most of the customers who would have purchased joint tickets to purchase Aspen-Skiing-only tickets instead. By refusing to do business on reasonable terms with its competitor, Aspen Skiing increased the sales of its own tickets and earned higher profits in the long run. It gave up its share of revenue from the joint tickets but gained revenue from increased sales of Aspen-Skiing-only tickets and increased usage of its associated services, such as its ski school, ski rentals, racing events, and restaurants.[4] Aspen Skiing's refusal to deal on reasonable terms was nevertheless condemned by the Court because it preserved monopoly power and did not improve the quality or price of Aspen Skiing's products or operations. 472 U.S. at 608-09.

In *Lorain Journal*, a monopoly newspaper refused to accept advertising from customers that also purchased advertising time on a new local radio station. It offered no explanation of why the refusal made business sense apart from its exclusionary effects, but instead relied on the right of every business to "select its customers." *Lorain Journal,* 342 U.S. at 155. The Court wrote:

> '[T]he word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.' The right claimed by the [Lorain Journal] . . . is neither absolute nor exempt from regulation. Its exercise as a purposeful means of

[4] The Court's opinion does not provide figures for Aspen Skiing's revenues, but upon termination of the joint ticket, its competitor's market share fell from 20.5% to 11% in four years and the latter's revenues from associated services "declined sharply as well." 472 U.S. at 594-95. Likely a significant amount, if not all, of this lost revenue was shifted to Aspen Skiing.

> monopolizing interstate commerce is prohibited by the Sherman Act.

Id. (citations omitted).

In lieu of advancing any explanation of how its conduct is procompetitive and therefore makes business sense apart from its exclusionary effects, Verizon raises a variety of arguments that, if accepted by the Court, would excuse it from having to demonstrate such a justification. These arguments are based on its characterization of the plaintiff's claim as one for refusals to deal, a description that, as explained above, ignores the thrust of the allegations. The arguments also conflict with established antitrust precedent about refusals to deal.

First, Verizon suggests that the antitrust laws do not require it to sell services at wholesale if it has never done so before. Verizon Br. at 18. This argument cannot be squared with *Otter Tail.* 410 U.S. 366. There the monopolist refused either to wheel wholesale electric power from other sellers or to itself sell power at wholesale to would-be municipal power authorities, thereby forcing those towns to accept it as their retail power distributor. While Otter Tail was regularly in the business of wheeling power for itself and others, it sold little power at wholesale: Otter Tail's "business . . . [was] almost exclusively retail." *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 56 (D. Minn. 1971). Yet its refusal to sell power at wholesale to potential retail competitors was condemned by the courts along with its refusal to wheel power to those entities. The provision in the district court's injunction barring Otter Tail from refusing to sell wholesale power, Sec. IVA, Amended Judgment, 1971 U.S. Dist. LEXIS 10845 (D. Minn. 1971), was upheld by the Supreme Court. 410 U.S. at 382. Otter Tail's refusal to sell power at

wholesale to competitors parallels the conduct alleged in this case.[5]

Moreover, Verizon's suggestion that it never sold services at wholesale until required to do so by the '96 Act, Verizon Br. at 19-20, raises an additional issue of fact not established in the record and inappropriately raised on a Rule 12(b)(6) motion to dismiss. Competitive access providers existed in some Verizon states prior to 1996. Some incumbents, including Verizon's predecessor, NYNEX Corporation, did business with them. Moreover, on occasion NYNEX engaged in a variety of arrangements with long-distance companies. Verizon's argument cannot be evaluated in the absence of evidence about the nature and scope of the wholesale services provided by its predecessors prior to passage of the '96 Act.

Verizon emphasizes that the CLEC involved in this case is a reseller, contending that the antitrust laws are less concerned about anticompetitive behavior that drives resellers out of a market than about similar behavior directed at competitors that operate their own facilities. Verizon Br. at 30. This claim is unfounded as a legal matter, but more importantly, the arguments Verizon advances contain no such limitation—they would apply with equal force to all competitors. Even a firm that utilized only its own facilities throughout, including over the last mile, would have to interconnect with Verizon in order for its customers to receive calls from Verizon customers and complete calls to them. If Verizon had no antitrust obligation to deal on

[5] The Fourth Circuit recently wrote that Otter Tail "*was* in the business of . . . selling electricity at wholesale," *Cavalier Tel., LLC v. Verizon Virginia, Inc.*, 330 F.3d 176, 187 (4th Cir. 2003) (emphasis in original), but the pages of the Supreme Court's opinion that it cites mention only Otter Tail's existing wheeling and retail sales businesses, not any ongoing sales of power at wholesale.

reasonable terms with a competitor, as it contends, then it would not have to interconnect even with a wholly facilities-based competitor unless regulation effectively compelled it to. There would be no antitrust backstop in the event the regulatory scheme proved unable to protect competition, as has occurred all too frequently in the past.

Verizon further contends that refusals of the sort it reads into the complaint are a different "class" of conduct than anything previously condemned under § 2 of the Sherman Act. Verizon Br. at 16. But the categories of antitrust misconduct are not narrowly circumscribed; "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Microsoft*, 253 F.3d at 58. Defining categories and then assigning conduct to one or another of them would divert attention from the main antitrust issue, whether a monopolist's conduct unreasonably preserved its market power. One of the strengths of the United States antitrust laws has been their consistent focus on whether challenged conduct is actually anticompetitive, without undue reliance on predefined categories. *See, e.g., Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). This analysis maximizes the strategic flexibility of all businesses, regardless of market share, while ensuring that anticompetitive conduct does not escape condemnation.

2. *Essential facilities analysis proceeds under the same "procompetitive business sense" standard*

The essential facilities doctrine is an older variant of refusal-to-deal principles and is analytically consistent with them. It has been adopted in every circuit and is well-established in antitrust jurisprudence.[6] The fourth element of

[6] *See, e.g., Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consolidated*

an essential facilities claim, that it would be feasible for the monopolist to permit access, is, as applied by the courts, the equivalent of the legitimate business justification standard applicable in refusal-to-deal cases. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). The analysis was succinctly expressed in the *AT&T* case:

> [P]roblems of feasibility and practicability may be taken into account by the Court in determining the sufficiency under the law of the access to essential facilities granted by defendants to non-Bell carriers. To put it another way, parity is not necessarily required. But . . . AT&T and its subsidiaries now discriminate between Long Lines and non-Bell carriers with regard to access to Bell System facilities. . . . this discrimination [is] anticompetitive in its effect. . . . The burden is now upon defendants to show why, despite that

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Rail Corp., 902 F.2d 174, 179 (2d Cir. 1990); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3rd Cir. 1996); *Advanced Health Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Communications Sys., Inc., v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3640 (U.S. Mar. 20, 2003) (No. 02-1423); *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F. 3d 1080, 1088 (D.C. Cir. 1998); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-58 (Fed. Cir. 1999). *See also* Robert Pitofsky, Donna Patterson, and Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 Antitrust L. J. 443 (2002).

> anticompetitive impact, such unequal treatment is reasonable . . . .

U.S. v. AT&T, 524 F. Supp. at 1361.

The essential facilities doctrine has been applied repeatedly to local telephone networks. Such a network remains the paradigm of an essential facility: it cannot be feasibly duplicated, yet access to it is essential for competition in related service markets. Application of the doctrine has produced significant competitive benefits, greatly enhancing the reliability, capacity, and efficiency of this nation's long-distance telephone communications and its telephone equipment markets. *Southern Pac. Communications*, 740 F.2d 980; *MCI v. AT&T*, 708 F.2d 1081; *U.S. v. AT&T*, 552 F. Supp. 131.

IV. CONGRESS HAS MANDATED THAT THE ANTITRUST LAWS CONTINUE TO APPLY TO TELEPHONY, AND EVEN IF IT HAD NOT, THOSE LAWS WOULD APPLY BECAUSE THERE IS NO "PLAIN REPUGNANCY" BETWEEN THE ANTITRUST LAWS AND THE REGULATORY SCHEME ESTABLISHED BY THE '96 ACT

A. The Antitrust Laws Govern Local Telephony

The antitrust laws apply to telephony, as they do to most regulated industries. The regulatory and antitrust regimes work together, each in its own way, to foster competition. The '96 Act expressly provides that nothing therein:

> shall be construed to modify, impair or supersede the applicability of any of the antitrust laws.

47 U.S.C. § 152 note. This was recognized by then-President Clinton when he signed the '96 Act into law:

> The Act's . . . antitrust savings clause . . . ensures that even for activities allowed under or required by the

> legislation, or activities resulting from FCC rulemakings or orders, the antitrust laws continue to apply fully.

Remarks on Signing the Telecommunications Act of 1996, 1996 Pub. Papers, vol. 1 at 189 (Feb. 8, 1996). In its initial order regarding the '96 Act, the FCC stated its view that the antitrust laws remain in force:

> Finally, we clarify, as one commenter requested, that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15565 (Aug. 8, 1996). This remains the FCC's position today. It has urged the courts to recognize the continuing applicability of the antitrust laws:

> . . . a violation of the 1996 Act is not necessarily a violation of the antitrust laws . . . [b]ut . . . neither does the 1996 Act bar claims that satisfy established antitrust standards . . . . Even if Congress had not clearly expressed its intent, well-established law would preclude construing the 1996 Act to effect an implied repeal of the Sherman Act absent a 'convincing showing of clear repugnancy between the antitrust laws and the regulatory system' . . . . [N]othing in the 1996 Act suggests a 'plain repugnancy' . . . between that Act and the antitrust laws, both of which are 'competition-friendly.'

Amicus Brief of the United States and the Federal Communications Commission, *Covad Communications Co. v. Bell Atlantic Corp.*, No. 02-7057, Dec. 17, 2002 (D.C. Cir.), *available at* http://www.usdoj.gov/atr/cases/f200500/200567.htm (citations omitted).

Regulation alone often cannot prevent anticompetitive abuses by a monopolist. *See U.S. v. AT&T*, 524 F. Supp. at

1347. In other long-monopolized telephony markets, effective entry was accomplished only following firm application of the antitrust laws. It is commonplace for the antitrust laws to remain in place in other industries as well, even in the face of a pervasive regulatory scheme. *See e.g., Silver v. New York Stock Exch.*, 373 U.S. at 357 (securities). In drafting the '96 Act, Congress could not have made more clear its determination that the antitrust laws should continue to apply to local telephony, as they have for decades. The Court should reject any invitation to reverse this clear congressional choice.

B. Application Of The Antitrust Laws Promotes Investment

Verizon asserts that requiring it to permit CLECs to lease its facilities discourages CLECs from investing in telephone infrastructure of their own. Verizon Br. at 27-28. This argument has already been rejected by this Court, which noted that it "founders on fact." *Verizon v. FCC*, 535 U.S. at 516.

Between 1996 and 2000, CLECs invested some $55 billion in telecommunications facilities. As the Court observed, "a regulatory scheme that can boast such substantial capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities." *Id.* at 1676. Similarly, antitrust principles that promote the same practices as the regulatory scheme cannot fairly be described as unreasonably deterring investment.

Moreover, *not* requiring Verizon to lease its last-mile facilities would bring CLEC investment in facilities to a standstill. There is no prospect that it will ever be cost-effective for a CLEC to duplicate the last mile between a local telephone end office and the customer's premises. Without the ability to lease access to the last mile, CLECs cannot feasibly reach most customers. CLEC investment in

infrastructure at the center of the network, behind the last mile, would be foolhardy unless CLECs' ability to lease functional access to customers over the last mile was assured.

Verizon also contends that the requirement that it lease its facilities unless it has a legitimate reason not to dilutes its incentives to make investments in infrastructure of its own. Verizon Br. at 27. Historical experience demonstrates, however, that competitive pressure is the greatest spur to investment, while the prospect of unchallenged market dominance invites complacency. Fiber-optic technology was developed in the early 1970s. While the market for long-distance telephone service remained solely in AT&T's hands, however, there was no competitive urgency for it to undertake expensive improvements in its long-distance network and it did not do so. New competitors, entering long-distance after AT&T divested its equipment and local service affiliates, installed the first fiber-optic cable networks for long-distance telephone service in the United States. Robert E. Litan, *Antitrust Enforcement, in* Revolution in the U.S. Information Infrastructure (Nat'l Academy of Engineering, 1995). Only then did AT&T begin to upgrade its own network with fiber. *Id.*

C. The Courts Provide An Appropriate Forum For Resolving Antitrust Claims

In determining liability in this case, the focus of the court's inquiry will be whether the conduct alleged is of the nature and scope of an antitrust violation. This is inherently not a regulatory inquiry, and regulatory processes are not particularly suited to evaluating it. Courts have for decades assessed claims of antitrust violations in regulated industries, and in the process have repeatedly cured significant anticompetitive conduct that regulators were not equipped to address.

Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) (Breyer, J.), is not to the contrary. That decision involved a price squeeze, a claim that presents unique difficulties—including the possibility that imposing liability could cause consumer prices to rise. There is no price squeeze claim in this case and no risk that the outcome will result in increased consumer prices. Moreover, *Town of Concord* concerned prices that had been expressly approved by regulators and upheld by a federal court of appeals in a proceeding in which the plaintiffs had actively participated. Here, in contrast, the challenged conduct has been condemned by regulators and the plaintiff has no opportunity to seek relief in a regulatory forum.

In designing injunctive relief, the existence of a regulatory scheme makes application of refusal-to-deal principles more feasible, not less. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989). Existing regulations can be used as guidance, and unresolved issues requiring regulatory processes and expertise can be referred by the court to the appropriate agency. Or a court can confine itself to general injunctive relief, setting outside limits but avoiding excessively regulatory detail.

In determining damages, the court will have no cause and no opportunity to design a regulatory scheme. It will be confined to determining the extent of the plaintiff's damages, attributable here to the difference in quality between the service the plaintiff would have enjoyed in the absence of the alleged misconduct, and the service it in fact received. This is an inquiry that courts and juries are well qualified to resolve.

Verizon also argues that judicial intervention is unnecessary to preserve competition in local telephone markets because of the pervasiveness of the regulatory scheme. The plaintiff's claim, however, is to the contrary—that antitrust

violations have occurred despite regulatory oversight. Verizon's argument presumes the outcome of the plaintiff's case without the benefit of evidence. If the plaintiff ultimately proves its case, it would not be the first time that regulation has failed to prevent antitrust violations in telephone markets.

Verizon's dire predictions about the consequences of litigating this case are unduly alarmist. Courts have long handled both the liability and relief stages of antitrust claims in regulated industries without venturing into territory more appropriately the province of regulators. *See e.g., Otter Tail*, 410 U.S. at 372 (electricity); *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 217-18 (1966) (shipping); *Silver v. New York Stock Exch.*, 373 U.S. at 357 (securities); *United States v. Radio Corp. of America*, 358 U.S. 334 (1959) (broadcasting); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (agriculture); *Aloha Airlines, Inc. v. Hawaiian Airlines Inc.*, 349 F. Supp. 1064, 1068 (D. Haw. 1972) (air travel). There is no sound reason to doubt the courts' ability to handle this case appropriately.

D. De Facto Immunity Would Conflict With Congressional Intent And Constitute Bad Policy

While Verizon disclaims any intention to seek immunity from the antitrust laws, the standard it urges on the Court would insulate it from antitrust challenge as completely as would immunity. A conclusion that courts are ill-equipped to assess antitrust violations in regulated industries, and that regulatory bodies offer the only appropriate forum for competitive issues in these industries, would preclude the bringing of any antitrust claims.

Those unable to bring a regulatory claim, such as the plaintiff in this case, would be entirely without remedy. And conduct that is outside the jurisdiction of the regulators but

affects competition in local telephony, such as is raised in a number of CLEC antitrust claims against ILECs, might be protected from antitrust challenge as well.

Moreover, regulatory processes are designed to produce narrow solutions to individual problems, not to address broad patterns of conduct. Regulatory processes can neither effectively assess such patterns nor provide effective relief where appropriate.

What Verizon seeks is immunity in everything but name. Adoption of the analysis it advocates would conflict with the clearly expressed will of Congress, which was based on decades of experience with the benefits to be gained from effective antitrust enforcement in telephone markets.

CONCLUSION

Established precedent, sound antitrust principles, and clear statutory directives warrant affirmance of the appellate court's decision in directing the denial of Verizon's motion to dismiss. Verizon urges this Court to sweep aside long-standing and well-reasoned antitrust authority on exclusionary conduct that maintains monopoly power, significantly loosening constraints on anticompetitive conduct by monopolists across the entire spectrum of the economy. Its alternative argument, that courts are not well-suited to evaluate antitrust claims in regulated industries and especially in local telephony, conflicts with the will of Congress and would mark a sharp break with a long and successful history of antitrust enforcement in other telephone markets.

These far-reaching arguments arise in the context of a skeletal complaint that is before the Court on a motion to dismiss. There is only a general description of most of the misconduct alleged, no evidentiary support for the factual assertions on which Verizon relies, and indeed no evidentiary record whatsoever. Thus, there is little by which to assess the

scope, nature, and effects of the conduct Verizon has allegedly undertaken.

Moreover, there is nothing by which to assess the existence of a legitimate business justification for Verizon's alleged actions. A monopolist may not engage in unreasonable conduct that prevents competition unless the conduct is procompetitive or efficiency-enhancing—it improves the cost or quality of its products or services or improves the internal efficiency of its operations. Verizon has not asserted, much less established, that it meets this standard, and therefore the decision of the Second Circuit should be affirmed.

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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF AMICUS

Amicus Covad Communications Company ("Covad") is a competitive local exchange carrier ("CLEC"). Covad is the largest independent provider of digital subscriber line ("DSL") service, a low-cost means of providing high-bandwidth internet access to businesses and consumers. Covad provides DSL service to the public through a combination of its own extensive network facilities and discreet, nonduplicable elements of the monopoly local telephone networks of incumbent local exchange carriers ("ILECs") such as Verizon.[1]

Covad has experienced first hand ILEC anticompetitive conduct of the type that is the subject of this action. Covad has been and continues to be severely harmed by that conduct while other DSL providers, and numerous other CLECs, have been driven out of business altogether.

Covad has two pending antitrust actions against ILECs for this very conduct now before the Courts of Appeals for the Eleventh Circuit (against BellSouth) and the District of Columbia Circuit (against Verizon). In both actions, the ILECs moved to dismiss at the pleading stage and Covad appealed. The District of Columbia Circuit has stayed Covad's appeal pending a decision in this case. *Covad Communications Co. v. Bell Atlantic Corp.*, No. 02-7057. The Eleventh Circuit reinstated Covad's claims against BellSouth. *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, *reh'g denied* 314 F.3d 1282 (11th Cir. 2002). The case is stayed while BellSouth's Petition for a writ of certiorari to the Eleventh Circuit is pending before this Court. *BellSouth Corp. v. Covad Communications Co.*, No. 02-1423 (petition filed Mar. 20, 2003).

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1. Pursuant to Supreme Court Rule 37.6, Covad states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than Covad and its counsel, contributed monetarily to the preparation or submission of this brief.

The parties have consented to the filing of all amicus briefs. Pursuant to Supreme Court Rule 37.3, letters evidencing these consents have been filed with the Clerk.

SUMMARY OF THE ARGUMENT

More than seven years have passed since Congress enacted the Telecommunications Act of 1996, 47 U.S.C. §§ 151, *et seq.* (the "1996 Act"), which was designed to bring true competition to local telecommunications markets. But as the United States observes, "[s]ince then, the incumbent local exchange carriers (ILECs), such as the Bell Companies that inherited AT&T's local telephone franchises, have remained dominant." Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner ("US/FTC Br."), 2. Competition has not materialized because the ILECs have manipulated the competitive and regulatory landscapes to extend their long-sanctioned, rate-payer funded local telephone monopolies into monopolies over other, emerging markets, including the markets for Internet access, in which Covad competes. The ILECs' persistent misconduct has devastated the competitive landscape. Many competitors have been forced out of business altogether and others, such as Covad, have been grievously injured. The ILECs' determination to exclude competition, and their success in doing so, despite the provisions of the 1996 Act, make clear the need for antitrust enforcement to bring an end to their exclusionary practices. Without such enforcement, competition will *never* develop.

1. The ILECs are engaged in a pattern of conduct that has been designed to and does devastate competition. They routinely proffer outright denials of access to their networks, engage in effective denials through the mechanism of conscious, unreasonable delays even when ostensibly deigning to provide access, and take countless steps to raise their rivals' costs so as to drive out competition (including by implementation of an anticompetitive price squeeze with regard to DSL). Through this course of conduct they have succeeded both in destroying most market entrants, and also in consolidating and expanding their own monopoly power.

2. The ILEC conduct about which Respondent and Covad complain is not novel territory unrecognized by the antitrust laws. Rather, traditional antitrust doctrines developed over

many decades preclude the precise type of misconduct in which the ILECs are engaged, precisely because it harms competition.

One need venture no further than the history of the telecommunications industry itself to reject the ILECs' notion that their conduct is beyond the reach of the antitrust laws. Their duty to provide reasonable access to their monopoly networks was expressly codified by the 1996 Act, but long predated it under the antitrust laws. AT&T's divestiture resulted directly from anticompetitive tactics virtually indistinguishable from those now perpetrated by its corporate progeny. Those practices have been recognized as unlawful under a number of traditional antitrust doctrines, long before the 1996 Act. The ILECs' attacks on antitrust doctrines such as essential facilities and monopoly leveraging simply ignore this Court's teachings in a misguided focus on labels. Whatever label is applied, this Court has long and consistently held that a monopolist violates Section 2 of the Sherman Act when it extends its monopoly over one market into monopoly power over another market. That is precisely what the ILECs stand accused of doing.

3. Verizon and its amici propose a new and unfounded test for Section 2 liability involving refusals to deal among competitors. They propose importing a quasi-predatory pricing standard, by which conduct is only unlawful if a monopolist has forsaken otherwise profitable sales to drive away competition. The Court has never adopted such a standard, and should not do so. Conduct need not involve a sacrifice of profits to be exclusionary. Rather, any conduct that excludes competition on a basis other than efficiency is exclusionary when engaged in by a monopolist. For example, monopolists in control of a nonduplicable network are uniquely positioned to exclude competition without ever sacrificing profits, merely by raising their rivals' costs.

Even if Section 2 liability depended on a showing that a monopolist has forsaken profits, the ILECs would be liable here and in the cases Covad has brought. Covad, like the CLEC in this case, does not seek to take any element of the ILECs'

networks for free. Rather, the 1996 Act incorporates a pricing structure that is, by law, profitable. Thus, each time the ILECs refuse to deal with CLECs such as Covad, they fail to utilize unused capacity on their networks. They thereby turn away profits and fail even the ILECs' imagined test for Section 2 liability.

ARGUMENT

I. The ILECs Routinely Engage In Exclusionary Conduct That Harms Competition

The antitrust laws and the 1996 Act have the same express goal - promoting competition. Section 2 prohibits exclusionary conduct that harms competition: the use of monopoly power "to foreclose competition, gain a competitive advantage, or destroy a competitor." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482-83 (1992) (*quoting United States v. Griffith*, 334 U.S. 100, 107 (1948)). Verizon turns the law and the facts upside down, claiming Section 2 should ignore whether "competitors remain viable" because competition itself "harms all rivals" and can "lead to a monopoly market." Brief for Petitioner ("Verizon Br."), 25. Section 2, however, evaluates both the means employed and the effects on competition. What a firm may acquire by means of *fair* competition is quite distinct from what a firm may do while wielding pre-existing monopoly power.

Verizon and its fellow ILECs have not engaged in fair competition. Their success is not due to "innovation or economies of scale or scope" as Verizon contends, Verizon Br. 25, but to their misuse of their historical monopoly of the local telephone network - which competitors must access to compete. They use their control over the local network to starve out their rivals and gain long-term competitive advantages. Verizon and its ILEC amici attempt to dismiss protests about their misconduct as mere quibbles about the particulars of contract performance. *See, e.g.*, Brief Amicus Curiae of BellSouth Corporation, SBC Communications, Inc., and Qwest Communications International, Inc. in Support of Petitioner ("BellSouth Br."), 2 (claim "based on routine performance disputes between contracting parties"). Their misconduct goes

far beyond mere technical breaches of contracts. It was and is intentional, so pervasive as to become institutionalized, and, unfortunately, highly successful. The ILECs have not only harmed competition, they have crippled it and, if left unchecked, fully intend to eliminate it.

A. ILEC Misconduct Affects Far More Than Local Phone Service Resellers

Respondent presents a compelling case that Verizon's exclusionary practices have harmed competition for the provision of basic local telephone service. But Covad addresses an even more serious problem. The ILECs have used, and continue to use, their control over the local telephone network facilities not merely to dominate the local telephone service market, but to gain and maintain monopoly power over entirely distinct markets. Covad participates in such markets, for local Internet access, and has experienced firsthand the ILECs' unlawful practices.[2] Verizon and the other ILECs are engaged in a pattern of conduct designed to exclude Covad and other competitors from competing with the ILECs for customers who want to connect to the Internet.

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2. The Second Circuit chose not to address the potential antitrust claims of CLECs in the context of the 1996 Act. *See Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89, 113 n.19 (2d Cir. 2002). However, to the extent the Court reaches the issue in this case, it is clear Covad, itself injured and participating in a market where the ILECs have successfully driven out all other non-ILEC competitors (*see* pp. 15-16 *post*), if anything has a substantially stronger claim of antitrust injury than even Respondent. *See, e.g., American Ad Mgmt., Inc. v. General Tel. Co. of Cal.*, 190 F.3d 1051, 1058 (9th Cir. 1999) ("[I]t is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff."); *Indeck Energy Services, Inc. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000) ("Although antitrust actions may, of course, be initiated by marketplace competitors, those actors in the economic forum must at least allege that exclusion of the competitor from the marketplace results in the elimination of a superior product or a lower-cost alternative"). Here, Covad has a direct relationship with the ILECs and its alleged injury results directly from the ILECs' exclusionary conduct. Whatever derivative injury consumers incur by reason of the harm to Covad may be worthy of redress, but certainly no more so than Covad's direct injuries.

Covad is a facilities-based CLEC. It independently owns, operates and maintains its own telecommunications transmission and related facilities instead of simply reselling the ILECs' telecommunications services. Verizon relies heavily on the inaccurate notion that its competitors simply resell its services. *See, e.g.*, Verizon Br. 3 (rivals "resell [ILECs'] services as mere marketers and middlemen"), 26 (disputing obligation to sell to "mere resellers"), 30 ("the rival simply resells the incumbent's service"); Brief of United Parcel Service, Inc., Honeywell International Inc., Visa U.S.A., Inc., and Eastman Kodak Company as *Amici Curiae* in Support of Petitioner ("UPS/Kodak Br."), 21 (rivals "resell the product or service at retail in direct competition with the firm"). Verizon is wrong. Facilities-based CLECs like Covad are not "mere resellers" of ILEC services. Covad undertook the massive investment to develop, build and support its own network. Thus, when Verizon and other ILECs refused to deal with Covad, they were not merely maintaining their existing monopoly but attempting to extend it into markets where access to the local telephone network was essential to competition. That conduct violates the antitrust laws, and always has.

B. Covad And The Deployment Of DSL Technology

The story of the ILECs' anticompetitive campaign against Covad and other DSL providers begins with the classic symptom of monopolistic complacency: suppression of innovation. Actions that "suppress alternative technology undeniably quash market competition which hurts consumers in a manner prohibited by the antitrust laws." *Int'l Bhd. of Teamsters v. Phillip Morris, Inc.*, 34 F. Supp. 2d 656, 663 (N.D. Ill. 1998), *aff'd*, 196 F.3d 818 (7th Cir. 1999); *see also United States v. Microsoft*, 253 F.3d 34, 76-78 (D.C. Cir.) (en banc), *cert. denied*, 534 U.S. 952 (2001) (Microsoft violated the Sherman Act by, among other things, suppressing Java technology development by competitors).

1. ILECs Suppressed DSL Technology

ILECs had DSL technology and the capability to deploy it for years before the 1996 Act but suppressed its development and deployment and withheld it altogether from the

consuming public to gain further monopoly profits from more expensive, less efficient, internet access services.[3]

At the time, due to the rapid acceleration of Internet use, the Internet access market was ripe for an affordable high-speed alternative technology. To fill that void, Covad introduced DSL, a "dedicated" local communications service that does not travel on the public, switched telephone network. Unlike switched offerings, dedicated services operate directly between two set points, provide high speed digital connections (as much as 50 times faster than the standard 28.8k modem used for dial-up internet access), and are continually connected. Thus, DSL customers get fast service, do not need to dial up every time they want to utilize the service, and they pay a flat, monthly fee, regardless of the amount of time they actually spend using the service. DSL technology is also affordable, because it operates over existing copper phone lines – the same ones ILECs use to provide voice telephone service and much slower or less cost-effective internet access services – obviating special trenching or cable installation that, until then, was necessary to get high-speed dedicated connectivity.[4]

Although DSL technology had been available for a number of years, Verizon and other ILECs suppressed it because they did not want to reduce their revenues from more profitable services. Specifically, ILECs offered: 1) POTS ("plain old telephone service"), the basic analog local telecommunications service used for voice calls and for dial-up connections to the Internet via modems, 2) ISDN ("Integrated Services Digital Network"), a digital dial-up telecommunications service that relies on the same telephone lines and infrastructure that is

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3. Complaint, *Covad Comm. Co. v. BellSouth Corp.*, No. 1:00-CV-3414, ¶ 15 (N.D. Ga. Dec. 22, 2000) ("BellSouth Compl."); Second Amended Complaint, *Covad Comm. Company v. Bell Atlantic Corp.*, No. 1:99-CV-01046, ¶ 45 (D.D.C. Aug. 10, 2000) ("Verizon Compl."). We expect the ILECs may dispute some of the facts asserted here. But because Covad's cases against ILECs such as Verizon and BellSouth are challenged, like Respondent's claims, at the pleading stage, it is the complaints' allegations, and not the ILECs' denials, that matter.

4. *See* BellSouth Compl., ¶¶ 7, 14, 18-21; Verizon Compl., ¶¶ 46-48.

used to provide POTS, and for which customers pay per minute charges; and 3) T-1 and Frame Relay, dedicated high-speed services run on (expensive) lines specially-installed for the individual user, usually a large business.[5]

2. The Response to the Threat Posed by Covad

Covad and other CLECs formed to take advantage of the DSL technology the ILECs had suppressed.[6] When that competitive threat emerged, however, the ILECs immediately raised significant barriers to impede competitive entry. In so doing, the ILECs delayed the initial commercial offering of DSL to the public (and competitive entry into the market) by more than a year, made impossible the widespread dissemination of DSL by CLECs, and guaranteed for themselves continued monopoly profits from other services.[7] More importantly, the delay gave the ILECs the time necessary to develop and deploy their own DSL offerings without fear of losing any competitive advantage to earlier entrants.[8] In the process, ILECs enacted arbitrary policies applicable only to CLECs that further raised CLEC costs for deploying DSL. This was possible solely because the ILECs controlled the key component to DSL delivery that competitors could not duplicate: the ubiquitous local telephone network.

Covad and other DSL CLECs need access to the local telephone network to provide DSL service. In particular, Covad must "collocate" – physically place equipment in ILEC facilities

5. *See* BellSouth Compl., ¶¶ 15, 17-22; Verizon Compl., ¶¶ 55-59.

6. *See* Verizon Compl., ¶¶ 45, 69; BellSouth Compl., ¶ 14.

7. *See* Verizon Compl., ¶¶ 69-70, 97; BellSouth Compl., ¶¶ 1, 45-46, 57.

8. All technology-focused industries place a great premium on being first to market. *See* Verizon Compl., ¶ 67. Once a system is up and running, it is more difficult for a competitor to get a potential customer to undergo the trouble and inconvenience of switching to another provider. *See id.* Therefore, "even minor delays" in interconnecting with an ILEC "can represent a serious and damaging business impediment to competitive market entrants." Second Report and Order, *In the Matter of Implementation of the Telecommunications Act of 1996*, 13 F.C.C.R. 17,018, ¶ 3 (July 14, 1998).

such as "central offices"[9] ("COs") – to connect to the existing telephone network.[10] It must also have access to the copper telephone wires (called "local loops") that connect businesses and residents to COs, and "transport" facilities, which are broadband transmission pipes that connect various COs to one another.[11]

C. The ILECs' Campaign To Exclude Competition

At every turn, ILECs have taken advantage of their control over the local telephone network to exclude Covad and other Internet access competitors – at first, by outright denials and subsequently, by imposition of unreasonable and expensive requirements and conditions, thereby raising CLEC costs. The ILECs, however, do not impose similar requirements, expenses, or delays on their own retail DSL operations. Instead, they allocate costs in such a way as to price their DSL offerings too low for rivals to match and still cover the high start-up costs the ILECs impose on rival operations.

1. Outright Denials of Collocation

The ILECs begin their exclusion of facilities-based CLECs such as Covad by simply shutting the gates. They routinely deny Covad and other CLECs collocation in numerous COs within their local service territories, unilaterally – and falsely – declaring that no space is available.[12] Because each collocation denial effectively prohibits Covad and other CLECs from serving that CO's

9. Central offices are the facilities where all of the residential and business telephone lines for a given geographic area come together and where the ILECs' telecommunications equipment (such as switches) is located. *See* Verizon Compl., ¶¶ 61-62; BellSouth Compl., ¶ 24. Each state has several hundred COs and none overlap in geography or customers. *See id.* California, for example, has more than 600. *See id.*

10. *See* Verizon Compl., ¶¶ 71, 91-92; BellSouth Compl., ¶ 31.

11. *See* Verizon Compl., ¶¶ 5, 63-64; BellSouth Compl., ¶¶ 25-44.

12. Physical collocation makes little demand on space. Covad's equipment, for example, typically occupies between two and four bays in the CO. Each bay of equipment is approximately seven feet high and two feet wide. *See* Verizon Compl., ¶ 93.

market, the ILECs have controlled whether, when and in which markets CLECs can enter and deploy DSL in competition with the slower or more expensive ILEC services and, later, the ILECs' own DSL offering.[13]

For example, Covad requested collocation in a CO in the District of Columbia metropolitan area. Bell Atlantic ("Verizon")[14] denied collocation, representing to both Covad and the state commission that the CO was a two-story building with very little unused, conditioned space. In fact, the CO has four floors and plenty of unused space suitable for collocation. In this false manner, Verizon has denied Covad collocation in many critical market COs within its territory, including Arlington, Crystal City, Tyson's Corner, and the Dulles Corridor, in Washington D.C., and Wayne, Conshohocken, Bryn Mawr, King of Prussia, and Landsdale in Pennsylvania. All of these are business centers with large communities of potential Covad small business customers.[15] The experience was the same around the country, no matter the ILEC.[16]

During that one year plus delay when the ILECs claimed there was "no space" for Covad, the ILECs found sufficient space in those COs to install the collocation equipment of their own retail DSL subsidiaries.[17] Indeed, despite the fact that Covad was by far first to market, the ILECs often ended up rolling out their own DSL offering in those disputed CO markets before Covad or any other CLEC.

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13. *See* BellSouth Compl., ¶ 24.

14. Verizon was formed from the merger of GTE Corp. and Bell Atlantic Corp. *See Big is Better*, The Investment Dealer's Digest, November 19, 2001, at 30-35.

15. *See* Verizon Compl., ¶¶ 99-103.

16. For example, Covad's experience in BellSouth's territory was no different. *See* BellSouth Compl., ¶¶ 47-49.

17. *See* Verizon Compl., ¶ 104.

2. Constructive Denials through Unreasonable Conditions

The ILECs' denials of access through control of collocation space have come at a high price for Covad and other CLECs in terms of time, resources, and delayed market entry. But even when ILECs have nominally granted access for collocation, they have taken advantage of every step of the process to create delay and impose additional unreasonable and unwarranted expenses on their rivals, creating an artificial and competitive advantage for their own unburdened DSL products.

a. Unreasonable delay

When ordering collocation, Covad has experienced unreasonable delay at every stage of the collocation request and provisioning process. Covad has often waited upwards of 120 days just to get a price quote for collocation.[18] Once Covad receives the price quote, places the firm order, and pays the required deposit, all that remains is for the ILEC to provision the collocation space. But at that point, the ILECs have again resorted to systematic delay tactics. For example, Covad waited 221 days for space in the Newman, Ga. CO, 228 days for space in Fort Lauderdale, Fla., 247 days in Hollywood, Fla., and in Atlanta, Covad waited more than 120 days for space in 17 of the first 35 COs in which it ordered space.[19] The process, from application to provisioning, took as much as 375 days in Georgia, 244 days in North Carolina, and 323 days in Florida.[20]

b. Anticompetitive build-out requirements

Even where the ILECs agreed to provide Covad with physical collocation, they have hindered Covad's ability to provide competing services by insisting that Covad

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18. *See* BellSouth Compl., ¶¶ 50-53.

19. *See id.*, ¶¶ 54-57.

20. *See id.*, ¶ 57. Other ILECs implemented similar delay tactics in the collocation application and provisioning process. *See* Verizon Compl., ¶ 124.

purchase what is known as a collocation "cage"[21] and inflating the costs of collocation. Since the ILECs actually built the cages, they also set the (often exorbitant) fees for that build. Verizon, for example, required much more than expensive cages; it required CLECs including Covad to build separate corridors, entrances, staircases, and even a bathroom before providing collocation.[22] Indeed, to build out in a single CO, Verizon quoted Covad physical collocation prices as high as $412,226 in Virginia, $368,141 and $252,300 in New Jersey, $115,900 in Pennsylvania, $115,543 in Delaware, and $154,711 in Maryland.[23]

For Covad and other CLECs, the "price-discounted" access Verizon complains of, Verizon Br. 10, 11, has yet to materialize. Verizon not only passed all its costs on to the CLECs attempting to collocate, it charged CLECs as much as *five times* Verizon's costs. In Bethesda, Maryland, for example, Verizon incurred $62,389 in collocation costs for the CO, however, it billed Covad and the other collocating CLECs more than $320,000 in *deposits* (*i.e.* 50% of the collocation price).[24]

c. Arbitrary loop policies

Once Covad has surmounted the first hurdle and collocated in a central office, it then encounters the ILECs' attempts to prevent it from buying and installing local loops. The ILECs have implemented arbitrary loop policies and procedures to limit the type of service CLECs could offer,

21. The collocation cage is a metal cage-like barrier that separates the physical space allotted to the CLECs equipment from the remainder of the CO. *See* Verizon Compl., ¶¶ 73, 105.

22. *See* Verizon Compl., ¶¶ 105-10, 257-59.

23. *See* Verizon Compl., ¶¶ 105-10. In other states, such as Massachusetts and New York, commissions supervised collocation practices more closely, and the average cost for collocation was much lower ($35,000 in Massachusetts and $43,814 in New York). *See id.*, ¶ 111.

24. *See id.*, ¶ 250. Verizon's over-pricing practice was not unique to Bethesda. Verizon demanded, and received, more than $200,000 (for $67,531 in costs) for its Moorestown, N.J. CO, more than $270,000 (for $61,000 in costs) for its Hackensack, N.J. CO, more than $140,000 (for $43,663 in costs) for its Columbia, Md. CO, more than $378,000 (for $154,904 in costs) for its Laurel, Md. CO, and more than $153,000 (for $66,125 in costs) for its Marlton, N.J. CO. *See id.*, ¶¶ 251-56.

hamper CLECs' ability to determine the availability of service to customers at the ordering stage, and add significant delay to the loop (and, thus, overall DSL service) delivery process. Because the ILECs' own retail DSL operations are not subject to these policies, the ILECs created an artificial competitive advantage over CLECs.

BellSouth, for example, implemented a *manual* loop ordering process for CLECs that is, by design, inept and calculated to produce delay, human error and uncertainty at every turn. The ILEC requires, for example, that each order be typed on a (complicated and confusing) request form and submitted manually via facsimile to BellSouth where an employee manually retypes the information into BellSouth's system. BellSouth often rejects (without notice to the CLEC) thousands of orders because the facsimile renders the transmission illegible or it claims the form is improperly filled out.[25] For its own DSL products, by contrast, BellSouth uses an electronic pre-ordering and ordering system which it does not make accessible to CLECs.[26]

Verizon similarly uses loop pre-qualification to impede competition. Verizon initially tied its willingness to provide loop information to its own ability to provide DSL services; when it was not offering DSL service, it simply refused to provide Covad or other CLECs with *any* loop information. Once Verizon deployed its own DSL service, it would only provide loop information for those locations where it provided DSL. In those locations, Verizon would only tell Covad the loop length, omitting other conditions such as load coils or bridged taps that could affect DSL transmission over that loop. In locations where Verizon was not providing DSL, Verizon subsequently claimed that it would only look up the pertinent information manually (even though Verizon had an automated loop information system) and provide it to Covad on a loop-by-loop basis, a time-consuming and ineffective method for

25. *See* BellSouth Compl., ¶¶ 67-68. BellSouth has at times turned off its facsimile machines without notice, and has changed facsimile numbers without notice, later contending that large numbers of orders were never received. *See id.*

26. *See id.*, ¶¶ 70-71.

handling the volume of loop orders Covad placed with Verizon. Under Verizon's system, therefore, Covad – unlike Verizon – could not guarantee its customers in advance what speed service they would get or when.[27]

3. Discrimination Against Rivals

The ILECs also discriminate against CLECs, and in favor of the ILECs' own retail DSL operations by dictating the very technology CLECs can use to provide DSL services. ILECs do this for no technologically sound reason, but rather to gain competitive advantages in, and therefore dominate, the Internet access markets.[28] "[A] parent corporation may favor its subsidiary so long as it does not lead to control of the relevant market." *H&W Indus., Inc. v. Formosa Plastics Corp., U.S.A.*, 687 F. Supp. 271, 276 (N.D. Miss. 1988), *rev'd on other grounds*, 860 F.2d 172 (5th Cir. 1988); *see also M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 166-68 (4th Cir. 1992) (vacating summary judgment in Section 2 action alleging hospital monopolized medical equipment market by marketing only its medical equipment subsidiary's products).

The ILECs have blatantly engaged in discrimination regarding a particularly promising technology for delivering DSL service, known as "line sharing." Line sharing permits a single local loop to carry both basic voice telephone service and DSL service to a customer, simultaneously.[29] A customer receiving DSL service via line sharing, therefore, does not need a second local loop.[30] But instead of permitting Covad and

27. *See* Verizon Compl., ¶¶ 125-130.

28. Relying on a Robinson-Patman Act discussion in a treatise, Verizon suggests a Section 2 action cannot be sustained when the allegation is that a parent company discriminated between its subsidiary and unrelated companies. Verizon Brief 18-19 & n.15. Unlike the Robinson-Patman Act (and Section 1 of the Sherman Act), Section 2 combats both unilateral and concerted actions that cause monopolization. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 776-77 (1984) ("Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed" by Section 2).

29. *See* BellSouth Compl., ¶ 84; Verizon Compl., ¶¶ 180-81.

30. *See, e.g., DSL FAQ: Why is a line sharing install easier?*, Broadband Reports.com, *available at* http://www.dslreports.com/faq/402.

other CLECs to use existing voice lines to provide digital service, Verizon and BellSouth have required Covad to procure a *second* line – that is, a new loop – to offer DSL service. At the same time, their own DSL operations utilize line-sharing.[31]

By forcing CLECs to purchase a second loop to service their customers and manipulating the process of allocating the cost of those local loops, the ILECs achieve an anticompetitive price squeeze. To price their retail DSL service, the ILECs attribute only a negligible portion of the cost of the local loop to DSL and other data services, attributing the overwhelming majority of the cost to the analog voice service they provide on the same line. The ILECs then set the retail prices for their DSL services at or below the price they charge CLECs for the wholesale unbundled loop ILECs require CLECs to purchase to offer DSL. Unable to match the ILEC DSL retail price and make a reasonable return on their investment, CLECs are trapped between the price they must pay as ILEC customers for the loop and the DSL retail price set by ILECs as competitive DSL providers.[32] The ILECs thus extend their monopoly over local loops into control over DSL service as well.

D. ILECs All But Destroyed Competition And Increased Their Monopolies

By means of this intentional pattern of conduct, ILECs successfully eliminated or seriously injured their rival CLECs and expanded the scope and reach of their monopolies. As one commentator aptly described the current situation:

> What's left of Ma Bell's progeny – BellSouth, Qwest, SBC, and Verizon – have maintained their lock on local phone service and driven most of their newfangled rivals to the hills. They've moved successfully into new markets like wireless and broadband Net access.

Jason Krause, *Dawn of the Big Bells*, The Industry Standard, April 20, 2001, *available at* http://www.thestandard.com/article/0,1902,23871,00.html. Indeed, the ILECs'

31. *See* BellSouth Compl., ¶ 85; Verizon Compl., ¶ 181.

32. *See* BellSouth Compl., ¶ 84-86; Verizon Compl., ¶ 179-84.

anticompetitive conduct "effectively dr[ove] every major [DSL] competitor except Covad out" of business. *Id.* All three of the prominent CLECs offering DSL service in direct competition with ILEC internet access offerings - Covad, Rhythms, and Northpoint - were forced into bankruptcy; all but Covad ceased doing business altogether. *See* Todd Wallack, *Covad Knows How To Survive*, S.F. Chron., Feb. 10, 2003, at E1; Todd Wallack, *Covad Makes A Comeback From Bankruptcy*, S.F. Chron., Sept. 6, 2002, at B1; *see also* Stephen P. Pizzo, *Why is Broadband So Narrow?*, Forbes, Inc., Sept. 10, 2001, at 50.

The ILECs reduced not only the ranks of their competitors, but their own ranks, via merger, thereby enhancing their already enormous monopoly power. The 1984 break-up of AT&T resulted in seven Regional Bell Operating Companies ("RBOCs," i.e. ILECs); now, as a result of several recent mergers, there are only *four*: Verizon (the largest), SBC, Ameritech, and Qwest. *See Big is Better, ante.* These four mega-ILECs dominate local telephone network facilities in enormous multi-state regions, and provide DSL and other Internet access services to an overwhelming percentage of the population in those states.

That intense consolidation was permitted only on the premise of the ILECs' ongoing obligations to open their networks to competition under the 1996 Act and further obligations assumed by the merging ILECs to compete with one another. *See* David Rohde, *Bells Are Failing to Compete As They Promised*, Network World, Inc., Mar. 5, 2001, at 1, *available at* http://www.nwfusion.com/news/2001/0305bellcomp.html. None of this promised competition has materialized. *See id.*; *see also* Krause, *Dawn of the Big Bells, ante*. As a result, the ILECs have taken the benefits of the 1996 Act with none of its burdens. The Act guards against this by means of antitrust enforcement.

II. Antitrust Remedies Are Necessary, Proper And Traditional Means To Combat ILECs' Anticompetitive Conduct

Verizon and its amici have mythologized the antitrust laws to create the appearance that access to their state-created, ratepayer-funded local monopoly networks would never be appropriate under the "unadorned antitrust laws." In reality,

many decades of antitrust law, in both regulated and unregulated industries, make clear that no monopolist may engage in the type of exclusionary conduct the ILECs have practiced so relentlessly for the past seven years. The claims against Verizon in this case are nothing new. Rather, they arise from the same conduct - abuse of the unique monopoly power inherent in the local telephone network - that led to the breakup of the old AT&T Bell System twenty years ago.

A. Traditional Sherman Act Section 2 Doctrines Forbid The ILECs' Exclusionary Practices

This Court has long held that there are defined limits on a monopolist's privilege not to deal with its rivals:

> It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.

Kodak, 504 U.S. at 483 n.32 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) ("right to refuse to deal with other firms does not mean that the right is unqualified"). As in *Kodak*, the conduct alleged here, which involves "market foreclosure," is "facially anticompetitive and exactly the harm that antitrust laws aim to prevent." 504 U.S. at 478.

Verizon and its amici rely heavily on critiques from various commentators to mask the lack of legal precedent for what their position truly represents: a dramatic change in how the antitrust laws treat exclusionary conduct by vertically integrated monopolists. But the Court has long recognized that the value of such theoretical economic constructs is limited, particularly where, as here, the Court is reviewing the case without benefit of a developed factual record. *See, e.g., Kodak.*, 504 U.S. at 486 ("In the end, of course, Kodak's arguments [about interbrand competition logically disciplining intrabrand market power] may prove to be correct. . . . But we cannot reach these conclusions as a matter of law on a record this sparse"). Covad's claims, like Respondent's, are challenged on the pleadings, not after development of facts through

discovery. At the pleading stage, the claims asserted by Respondent (and those asserted against the ILECs by Covad) state well recognized violations of Section 2 of the Sherman Act.

1. The Unique History of the Regulated Telecommunications Industry Demonstrates the Importance of Antitrust Enforcement

The 1996 Act may indeed have been "something brand new" when it was enacted seven years ago. Verizon Br. 2. But the need to restrain exclusionary abuses by those who control the local telephone network is nothing new. Local telephone monopolists have long been using their control over the nonduplicable local network – a network that literally connects by wire all end users in a given geographic region – to exclude competition in other markets that depend on access to that monopolized local network. Verizon's amici assert that an "ILEC's affirmative duties to share its resources with rivals derive not from antitrust law but from the 1996 Act." BellSouth Br. 8. They ask the Court to ignore the history of the antitrust laws, and in particular the painful history of anticompetitive conduct by local monopolists in the telecommunications industry.

The requirement to provide reasonable access to elements of the local telephone network did not originate with the 1996 Act but existed decades before it. Local telephone monopolists have long been required to provide competitors full access to their local networks, through a process called interconnection. *See In the Matter of Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules*, 29 F.C.C.2d 870, 940, ¶ 157 (1971) ("*Specialized Common Carrier*"). The FCC regulated that interconnection duty and AT&T was famously found to have violated the antitrust laws for failing to comply with it.

Interconnection is not one duty, but a set of duties. It has long included the obligation to lease local loops to competitors, who are entitled to full use of them. *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1106 (D.C. Cir. 1984); *Bell Tel. Co. of Pa. v. F.C.C.*, 503 F.2d 1250, 1259

(3d Cir. 1974); *MCI Comm. Corp. v. AT&T Co.*, 708 F.2d 1081, 1140 & n.88 (7th Cir. 1983); *Specialized Common Carrier*, 29 F.C.C.2d at 938, 940, ¶¶ 151, 157; *see also MCI*, 708 F.2d at 1133 (finding MCI's request to lease local loops was not a request to abandon facilities). Interconnection also obliged local monopolists to provide physical connection between the local network and competing networks – the same duty embraced under the 1996 Act by collocation. *See United States v. AT&T Co.*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981) ("*AT&T*") ("Long distance and other intercity lines are essentially useless unless they can be connected to the local switches."). Those duties expressly applied to ensure reasonable access for competitors providing advanced services, such as the DSL service Covad provides. *See California v. F.C.C.*, 39 F.3d 919, 929 (9th Cir. 1994) (recognizing pre-1996 FCC order that "BOCs must provide other enhanced service providers the same interconnections the BOCs use in providing their own services"); *see also In the Matters of Amendment of Sections 64.702 of the Commission's Rules and Regulations*, 2 F.C.C.R. 3072, 3080, ¶ 61 (May 22, 1987) ("carriers must provide efficient nondiscriminatory access to the basic service facilities necessary to support their competitors' enhanced services").

The ILECs' pre-1996 obligations included not just the duty to provide access, but to do so on "just and reasonable terms" that would place competitors on "as nearly as equal plane as may be." *AT&T*, 524 F. Supp. at 1353 (*quoting United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 411 (1912)); *California v. F.C.C.*, 905 F.2d 1217, 1229 (9th Cir. 1990) (noting FCC's *pre-1996* "open-network policy of requiring the BOCs to make the telephone networks as accessible to competitors as they are to the BOCs themselves"). Indeed, AT&T was found liable under the Sherman Act some twenty years ago for forcing interconnections to take place by means of "inappropriate or inefficient equipment or procedures." *MCI*, 708 F.2d at 1150.

Beyond its straight refusals to provide reasonable access to its monopoly local network, AT&T also took advantage of the regulated nature of the industry to impede competition:

> Finally, and most importantly, the filings with the state commissions (as a culmination of the

> negotiations) added additional months of delay before MCI could enter the market. The combined effect of the bad faith negotiations and the filing of the state tariffs may have cost MCI one and a half years of time and revenue while it fought for interconnections, first with AT&T at the bargaining table and later in the FCC and the courts.

MCI, 708 F.2d at 1158.

The same pattern of obstruction and delay has continued under the 1996 Act, as described in detail above. *See* pp. 6-16, *ante*. As this Court has recognized, ILECs have caused competitively meaningful delays through refusals to comply with the 1996 Act:

> A separate rate for an unbundled element is not much good if . . . the incumbents refuse to allow the leased elements to be combined with a competitor's own equipment. And this is just what was happening before the FCC devised its combination rules. Incumbents, according to the FCC's findings, were refusing to give competitors' technicians access to their physical plants to make necessary connections.

Verizon Comm., Inc. v. F.C.C., 535 U.S. 467, 532 (2002). Indeed, just as the old AT&T did, the ILECs are actively using the litigation process to delay whatever administrative enforcement might otherwise apply. Fully seven years after the 1996 Act was enacted, the basic rules under which it will be administered are still yet to be finally resolved. *See, e.g., United States Telecom Ass'n v. F.C.C.*, 290 F.3d 415 (D.C. Cir. 2002) (remanding implementation order to FCC for a *third* round of reconsideration, six years after 1996 Act enacted). That conduct frustrates competition. *See, e.g., Southern Pac. Comm. Co. v. AT&T Co.*, 740 F.2d 980, 1001-02 (D.C. Cir. 1984) (cost and delay inherent in regulatory process "clearly constitute barriers to entry").

The FCC has observed that even minor delays in providing interconnection to local telephone networks "can represent a serious and damaging business impediment to competitive market entrants" such as Covad and AT&T, the CLEC serving

Respondent. Second Report and Order, *In the Matter of Implementation of the Telecommunications Act of 1996*, 13 F.C.C.R. 17,018, ¶ 3 (July 14, 1998). FCC and state administrative agencies simply do not have the power to deter such conduct, nor to compensate its victims. The FCC acknowledges this. FCC Chairman Michael Powell has told Congress that "[g]iven the vast resources of many of the nation's ILECs," the FCC's current fining authority of $1.2 million per offense "is insufficient to punish and deter violations in many instances." Letter from Chairman Powell to House and Senate Appropriations Committees of 5/4/01. Antitrust remedies, including treble damages and attorneys' fees, are necessary to make the ILECs, with their vast resources, obey the law.

2. Monopoly-to-Monopoly Leveraging is Unlawful

Verizon and its amici attempt to present the concept of monopoly leveraging as somehow beyond the realm of the "real" antitrust laws. *See, e.g.*, Verizon Br. 43 (monopoly leveraging theory is "largely discredited"); BellSouth Br. 20 (monopoly leveraging theory "conflicts with established limits on antitrust law"). That argument is impossible. Decades of this Court's decisions have expressly upheld liability for monopoly leveraging. As the Court observed in *Kodak*, it "has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next." *Kodak*, 504 U.S. at 479-80 n.29 (citing cases). That is a point on which the *Kodak* majority and dissent agreed. 504 U.S. at 498 ("The Court correctly observes that the antitrust laws do not permit even a *natural* monopolist to project its monopoly power into another market") (Scalia, J., dissenting) (emphasis in original).[33]

There can be no question, at this point, that monopoly leveraging is a well-established Section 2 violation. *See, e.g.*,

33. *See also* 504 U.S. at 476 n.23 ("A firm can exact leverage whenever other equipment is not a ready substitute. F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 16-17 (3d ed. 1990)"). There is no substitute, ready or otherwise, for critical elements of the ILECs' local telephone network, such as local loops.

United States v. Griffith, 334 U.S. 100, 108 (1948) (monopoly power cannot be used "to beget monopoly"), *overruled on other grounds sub nom. Copperweld*, 467 U.S. at 764 n.8; *United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948). And the attempted extension of even a lawful monopoly is improper "whatever the nature of the device by which" the monopolist attempts to extend its monopoly. *Leitch Mfg. Co. v Barber Co.*, 302 U.S. 458, 463 (1938). Even those ingenious enough to develop a lawfully patented product cannot seek to leverage or extend their monopolies. *Id.* As an historically state-supported and ratepayer-funded monopoly, Verizon has, if possible, even less justification for extending its monopoly power into other markets.

In reality, the ILECs are merely using perceived infirmities in the Second Circuit Court of Appeals' particular formulation of the monopoly leveraging test to eliminate leveraging liability altogether. There is no basis to do so. Whether the Court adopts the Second Circuit's view that gaining a "competitive advantage" in the secondary market suffices, or the more stringent view requiring at least a dangerous probability of obtaining a monopoly in the secondary market, the ILECs fail the test. They have "exploited [their] dominant position" over the local telephone network to gain monopolies, not merely competitive advantage, in a number of additional markets – including, in the case of Covad, the market for Internet access. *See* pp. 15-16, *ante*. Whatever leveraging standard the Court applies, the ILECs' conduct violates the antitrust boundaries this Court long ago established.

3. The Essential Facilities Doctrine Properly Applies to the ILECs' Attempts to Use Their Local Network Monopolies to Control Secondary Markets

Verizon and its amici criticize the essential facilities doctrine at length, pointing out that this Court has never "recognized" the doctrine. *See, e.g.*, Verizon Br. 40; US/FTC Br. 21. But they cannot dispute that all thirteen Courts of Appeal recognize the doctrine, and agree as to its elements.[34]

34. *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Interface Group, Inc. v. Mass. Port Auth.*, (Cont'd)

And so did the United States in its brief in support of Verizon's petition for a writ of certiorari in this matter. The United States described the principle behind "the leading case," the Seventh Circuit's decision in *MCI*, 708 F.2d at 1132-33 as follows: "a monopolist may be required to assist rivals by sharing a facility if the monopolist can 'extend monopoly power from one stage of production to another.'" Brief For The United States And The Federal Trade Commission As Amici Curiae, *Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko*, On Petition for a Writ of Certiorari, No. 02-682 (filed Dec. 2002) at 12 (*quoting MCI*, 708 F.2d at 1132-33).[35] In other words, the essential facilities doctrine as exemplified by *MCI* merely addresses one situation where an unchecked monopolist would otherwise extend its monopoly into a secondary market – conduct the "Court has held many times" is unlawful. *Kodak*, 504 U.S. at 479-80 n.29.

a. Essential facilities claims involve extension of a monopoly into a second market

The essential facilities claim asserted against ILECs by Covad, even more so than the claim asserted by Trinko, fits

(Cont'd)
816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179-80 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Advanced Health-Care Serv., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Comm. Sys., Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI Comm. Corp. v. AT&T Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Comm. Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285-88 (11th Cir. 2002), *reh'g denied*, 314 F.3d 1282; *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-57 (Fed. Cir. 1999).

35. Verizon mistakenly asserts that all CLEC claims seek affirmative "assistance" and to force ILECs to "share" their resources. *See, e.g.*, Verizon Br. 11, 27. That is not what Covad seeks. Rather, the ILECs are refusing to lease to Covad elements of their networks that by definition they are not otherwise using, and from which they are not otherwise deriving the income Covad would provide. *See* pp. 26-30, *post*.

perfectly the *MCI* essential facilities test. *MCI* distinguished between two sets of demands for network access by MCI. The Seventh Circuit found MCI stated an essential facilities claim when it sought access to elements of AT&T's monopoly local telephone network that could not reasonably be duplicated, to use those elements to provide a separate and distinct product, long distance service. *MCI*, 708 F.2d at 1132-33. By contrast, the Seventh Circuit found MCI had not proved an essential facilities claim when it sought access to elements of AT&T's long distance network, in part because MCI had not proved the elements it sought to lease were essential (MCI having shown the ability to duplicate them), *id.* at 1147-48, and, given the elements were not essential, MCI could not claim a right to unfettered access to AT&T's entire network merely to provide the same service AT&T was providing. *Id.* at 1149. Verizon has focused on the latter component of the Seventh Circuit's analysis in isolation, to argue that there can be no essential facilities claim when the competitor merely provides the same service as the incumbent whose facilities it seeks to share. Verizon Br. 42. But that is not what *MCI* held, nor would it be a coherent result; if a plaintiff meets the four well-established elements of the essential facilities doctrine, there is no reason to import a new unspoken element that the competitor must participate at a different level of the market than the monopolist.

In any event, even if the essential facilities doctrine were somehow inapplicable to those who resell a monopolist's products in the same market, that would not justify the ILECs' plea to do away with the essential facilities doctrine altogether. It is true that some CLECs merely resell local service they buy from ILECs at wholesale. But many other CLECs, including Covad, use interconnection with and elements of the monopoly local telephone networks to provide competition to the ILECs in markets other than the market for local telephone service. This Court's long-standing Section 2 precedents – whether labeled under the essential facilities doctrine or not – confirm that it is unlawful to wield monopoly power where doing so extends that monopoly power into other markets. *See* pp. 26-30, *post*.

b. Essential facilities claims are especially important in "natural" monopoly markets

Even Verizon's amici concede that an essential facilities approach to refusals to deal is most necessary where the monopolist controls a "natural monopoly." *See* UPS/Kodak Brief 25. Academic commentators have agreed. *See, e.g.*, Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 n.21 (1990) (*MCI* "is probably correct [in holding] a monopolist must, when feasible, make its essential facility available to a competitor who is unable to duplicate it."); Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 7.7a, 274 (2d ed. 1994) (courts have regularly found to be essential "structures, plants or other valuable productive assets that were created as part of a regulatory regime, whether or not they are properly natural monopolies").

The local telephone network has long been recognized as a paradigm of a "natural" monopoly. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) ("States typically granted [the ILECs] an exclusive franchise in each local service area"). As this Court has found, because each local telephone network involves a set of literally many millions of telephone wires connecting each home and business in the region, duplication of that network is impracticable in the extreme. *See Verizon*, 535 U.S. at 490 ("It is easy to see why a company that owns a local exchange . . . would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long-distance calling as well.").

The courts have consistently found – long before the 1996 Act – that this "natural" monopoly power carries with it an obligation that the local telephone monopolists provide reasonable access to those local network facilities. *MCI*, 708 F.2d at 1133, 1138, 1140-41; *AT&T*, 524 F. Supp. at 1353 ("clear that the local facilities controlled by Bell are 'essential facilities' within the meaning of these decisions"); *Southern Pac. Comm.*, 740 F.2d at 1008 (finding "the Bell operating companies' local distribution facilities are 'essential facilities'" and that the

antitrust laws "prohibit AT&T from unreasonably and discriminatorily restricting access to these essential facilities"); *see also* Phillip E. Areeda & Herbert Hovenkamp, 3A *Antitrust Law* 2d ¶ 772, 175 (2002) ("whether or not local 'hard-wired' telephone service is best delivered by a monopoly, it would be unwise to allow that monopoly to obstruct free competition in long distance services or telephone instruments, where competition is clearly possible").

B. Even Under The ILECs' Unfounded View Of Exclusionary Conduct, Their Conduct Is Still Exclusionary

Verizon and its amici argue for a special, heightened pleading standard for Section 2 refusal to deal claims against vertically integrated monopolists. That position is at odds with their repeated assertions that there are no subcategories of Section 2 offenses – *i.e.*, essential facilities does not exist as an independent claim; monopoly leveraging does not exist, and so on. All Section 2 claims, however labeled, have just two necessary elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." *Kodak*, 504 U.S. at 481 (*quoting United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). The conduct the ILECs are alleged to have engaged in more than satisfies that pleading test, the only one this Court has ever said applies to refusal to deal claims. Verizon's proposed test would immunize conduct recognized by established antitrust principles as anticompetitive. In any event, even if the Court adopted the new "predatory pricing" standard Verizon urges, Verizon would still fail the test because it routinely foregoes profits when it refuses to deal with CLECs such as Covad.

1. Verizon and Its *Amici* Try to Create a False Predatory Pricing Requirement for Section 2 Liability

As the Court put it in *Kodak*, what Verizon and its amici seek here would be "a radical departure in this Court's antitrust law." 504 U.S. at 479-80 n.29. They seek the creation of a new pleading rule, one that essentially imposes a predatory pricing requirement before a monopolist may be found to have engaged in an actionable refusal to deal. That proposed

amendment to the Sherman Act is both unfounded and ill-advised.

The United States argues that the Court should analyze claims against ILECs using the same "sort of analysis [it employs] with respect to predatory pricing." US/FTC Br. 16. That would be a massive change to, not an application of, the antitrust laws. It is true the courts "have recognized that conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power." *Id.* But that is not the *only* form of conduct that qualifies as exclusionary. Rather, the Section 2 jurisprudence of this Court and the lower courts recognizes that "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Id.*, 14 (*quoting Microsoft*, 253 F.3d at 58).

That is why courts analyzing claims of exclusionary conduct have focused not on attempts to establish a list of practices that are (or are not) exclusionary, but have analyzed instead the "*anticompetitive effect*" of the challenged conduct. *Microsoft*, 253 F.3d at 58. Thus, conduct is exclusionary if it "harms the competitive process." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.). Contrary to Verizon's suggestion, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), did not require, to state a refusal to deal claim, that a monopolist forego profits or change a prior policy of dealing with competitors. To the contrary, *Aspen* recognized the broad and flexible nature of exclusionary conduct: "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." 472 U.S. at 605 (*quoting* R. Bork, The Antitrust Paradox, 138 (1960)). *Aspen* went on to quote the Areeda and Turner definition of exclusionary conduct: "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 605 n.32, (*quoting* P. Areeda & D. Turner, 3 *Antitrust Law* ¶ 626b, 78 (1978)). While the fact pattern in *Aspen* certainly

met that test, the Court has never – in *Aspen*, *Kodak* or elsewhere – pronounced that only forsaking profits would do so.[36]

2. Raising Rivals' Costs Is Exclusionary

Verizon's proposed test is obviously flawed because it exempts from liability any anticompetitive conduct that does not involve the sacrifice of profits. Among other things, it thus immunizes the well-recognized propensity of monopolists to destroy competition without ever foregoing a cent of profit, by raising their rivals' costs. *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Cost to Achieve Power Over Price*, 96 Yale L.J. 209, 224 (1986) ("Raising rivals' costs can be a particularly effective method of anticompetitive exclusion. This strategy need not entail sacrificing one's own profits in the short run. . . ."); *see also* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 318-23 (2001) (discussing economic logic behind raising rivals' cost theory). Raising rivals' costs has been a primary mechanism by which ILECs have destroyed competition.

Where, as here, a monopolist controls inputs that are necessary to competition, it can thwart that competition by raising its rivals' costs of obtaining them. That may happen directly, as with the type of price squeeze condemned in the landmark *Alcoa* case, *United States v. Aluminum Co. of America*, 148 F.2d 416, 437-38 (2d Cir. 1945); *see also* Steven C. Salop, *Economic Concepts and Antitrust Analysis*, 56 Antitrust L.J. 57, 58-59 (1987) (evil of price squeeze is not predatory pricing; "rather, it is a claim that firms exclude rivals and gain power over price by raising their rivals' costs"). Monopolists have also found more subtle means to inflate their competitors' costs. *See, e.g.*, *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*,

36. Indeed, the Seventh Circuit has interpreted *Aspen* to mean "a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir.) (Posner, J.) *reh'g denied*, 802 F.2d 217 (1986), *cert. denied*, 480 U.S. 934 (1987). That is precisely what Respondent, and CLECs such as Covad, have alleged. The ILECs refuse to deal with CLECs with the specific knowledge that their refusal makes it impossible to compete.

784 F.2d 1325, 1339-40 (7th Cir. 1986) ("When a firm finds a way to confront its rivals with higher costs, it may raise its own prices to consumers without drawing increased output from them."); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997), *aff'd*, 525 U.S. 299 (1999) (reversed summary judgment; policy raised factual question of whether conduct raised competitor's costs); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995) (raising rival's costs "would qualify as anticompetitive conduct unless [defendants] could demonstrate a legitimate business justification for it").

Verizon and its fellow ILECs have perpetrated both types of raising-rivals'-costs schemes – especially against facilities-based CLECs such as Covad. The ILECs have engaged in direct price squeezes, *see* p. 15, *ante*, and routinely employ countless mechanisms to make the interconnection process as time-consuming and costly as possible, *see* pp. 12-14, *ante*, all with no purpose but to extend their monopoly over the local telephone network into monopoly power over downstream markets such as the market for Internet access. The United States emphasized the exclusionary effects of just such a strategy, when used by AT&T:

> Even with respect to those limited facilities AT&T agreed to provide, it imposed a number of cumbersome and unnecessary technical and operational practices on its competitors which increased their costs and lowered the quality of their service, in marked contrast to the efficient interconnection arrangements made available to AT&T's own intercity private line connections.

Plaintiff's Memorandum in Opposition to Defendant's Motion for Involuntary Dismissal Under Rule 41(b), at 79, *United States v. AT&T Co.*, No. 74-1698 (D.D.C., filed Aug. 16, 1981). Yet the approach suggested by Verizon and the United States, which would require predatory pricing to state a refusal to deal claim, would place all that plainly anticompetitive conduct beyond the reach of the antitrust laws. That would indeed be a "radical departure" in the law.

The United States' position also appears to be a radical and unexplained departure from its prior position concerning CLEC antitrust claims against ILECs. The United States (together with the Federal Communications Commission) opined to the Court of Appeals for the Eleventh Circuit in 2001 that a CLEC's allegations of an ILEC's "failure to provide reasonable interconnection" under the 1996 Act - remarkably similar to the allegations asserted by Respondent here and by Covad in its lawsuits against ILECs - sufficiently "allege[d] exclusionary conduct by a firm with monopoly power that lacks business justification and that harms competition." *See* Brief for the United States and Federal Communications Commission as Amici Curiae in Support of Appellants, *Intermedia Comm., Inc. v. BellSouth Telecomm., Inc.*, No. 01-10224-JJ (11th Cir. filed Mar. 28, 2001) 25-26. Verizon and its amici offer no explanation how the antitrust laws have changed since then, so that such conduct is no longer exclusionary, as a matter of law.

3. ILECs Routinely Forego Profits to Harm Competition

Even if the Court adopted the new "predatory pricing" test proposed by Verizon and the United States, Verizon and its fellow ILECs would still be liable under it. Just as in *Aspen* and *Kodak*, to exclude their CLEC competitors, the ILECs *are* foregoing profits, by refusing to engage in what would otherwise be profitable sales. CLECs, after all, do not buy unbundled network elements from ILECs for free or even, as Verizon falsely suggests, at cost. Rather, the FCC has mandated that states price unbundled network elements using the Total Element Long Run Incremental Cost ("TELRIC") methodology, which expressly covers both the ILECs' costs and a reasonable profit. *Verizon*, 535 U.S. at 493, 500 n.19. Indeed, given that most elements of the local telephone network (including, notably, the many millions of essential local loops controlled by the ILECs) have been in place and funded by ratepayers for many decades, it is hard to imagine how the ILECs could claim the transactions are unprofitable.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of court of appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ARIZONA, CONNECTICUT, DISTRICT OF COLUMBIA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, OREGON, PUERTO RICO, VERMONT, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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The *Amici* States, through their Attorneys General, respectfully submit this brief as *amici curiae* urging affirmance of the decision below.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Attorneys General of the States enforce federal and state antitrust and consumer protection laws and advocate on behalf of consumers and businesses within their States. The States also play an important role in enforcing the obligations of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"). For more than a century, a few firms have dominated telecommunications markets in the *Amici* States. As advocates for consumers and businesses, the *Amici* States have worked to overcome the adverse effects of lack of competition and desire to see the 1996 Act's goal of promoting competition realized. These experiences have confirmed their belief, like that of Congress when it enacted the 1996 Act, that antitrust remedies must remain available to further competition in local telecommunications markets.

SUMMARY OF ARGUMENT

Verizon, an incumbent local exchange carrier ("ILEC"), owns local exchange facilities. Access to those facilities is essential to providers of telecommunications services in a wide array of product markets. Verizon also is a competitor in those markets. The complaints in this and other similar antitrust actions allege conduct by Verizon and other ILECs which, if true, could entrench and extend their monopoly power, allowing them to raise prices and stifle innovation.

Verizon and its *amici* propose a rigid, categorical test for exclusionary conduct under Section 2 of the Sherman Act, 15 U.S.C. § 2, which would permit dismissal of such complaints on their face, without any factual inquiry into whether a threat to competition — and hence, to consumers — exists. The novel standard that Verizon and its *amici* urge departs markedly from the Section 2 analysis developed by this Court and applied by the lower courts. If adopted, their proposal would significantly limit the availability

of Section 2 as a means to protect competition not only in telecommunications markets, but in markets generally.

In Point I, *Amici* States demonstrate that antitrust enforcement has a well-established and vital role to play – expressly recognized by Congress when it enacted the 1996 Act – in guarding against anticompetitive refusals to deal by ILECs in local telecommunications markets. History demonstrates that an ILEC's control of a local exchange confers significant opportunities to harm rivals and – in turn – the competitive process that benefits the public at large.

In Point II, the *Amici* States explain that, under this Court's precedents, an ILEC's refusal to deal with rivals may result in Section 2 liability if the refusal is likely to maintain or extend the ILEC's monopoly power and is unnecessary to achieve overriding efficiency benefits. The limits on Section 2 that Verizon and its *amici* would impose are unwarranted. In particular, the notion that a monopolist may engage in any conduct that makes "business sense" apart from enhanced monopoly returns is directly contrary to this Court's Section 2 precedents and would immunize conduct that plainly harms consumers.

Point II also responds to Verizon and the United States' arguments that the Section 2 theories cited by the Second Circuit – essential facilities and monopoly leveraging – cannot support liability under Section 2 where an ILEC has allegedly refused to deal with rivals. Point II shows that where such allegations are properly made, these theories of liability have a legitimate role to play in identifying exclusionary conduct.

ARGUMENT

I. Antitrust And Regulatory Enforcement Under The 1996 Act Are Complementary Means To Achieve The Benefits Of Competition In Local Telecommunications Markets

A. Congress Expressly Stated its Intent to Preserve Antitrust Enforcement in Telecommunications Markets.

When it enacted the 1996 Act, Congress expressed its intent to preserve antitrust remedies in local telecommunications markets in unmistakable language: "[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 1996 Act, *supra*, § 601, 110 Stat. at 143, 47 U.S.C. § 152 (note). The 1996 Act also provides: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." *Id.*

Just as the 1996 Act's antitrust savings clause leaves no room to argue an implied repeal of the antitrust laws, so too the Act's express purpose precludes any assertion that its objectives conflict with those of antitrust enforcement. Emphasizing the common purpose that the antitrust laws and the 1996 Act share, Congress stated that the Act is designed to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 1996 Act, *supra* (title).

In regulatory proceedings, Verizon itself has emphasized that antitrust laws continue to apply to local interconnection disputes. In obtaining FCC approval of its application to serve the long distance market in New York, Verizon argued against more stringent regulatory safeguards, acknowledging that if it "were nevertheless to engage in anticompetitive conduct, carriers would of course be able to resort to private remedies under generally applicable statutes, *including the treble-damages*

remedy of the federal antitrust laws."[1] The FCC specifically noted Verizon's admission in approving the application.[2]

B. Antitrust Remedies Are Essential to Police Anticompetitive Behavior by ILECs.

Despite Congress' explicit rejection of antitrust immunity, Verizon argues that denials of, and interference with, access to local exchanges are a concern only of telecommunications regulation. According to Verizon, duties to permit access to local exchanges are the "novel" creation of the 1996 Act and do not otherwise exist under the "unadorned" antitrust laws (*See* Pet. Br. at 9 (quoting *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399-400 (7th Cir. 2000)); *id.* at 16-17).

In fact, the opposite is true. The antitrust laws are the preeminent legal tool to promote and protect marketplace competition – "the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). In telecommunications markets, in particular, antitrust tribunals played a vital role in introducing the very competition that the 1996 Act seeks to expand. Drawing on Sherman Act Section 2 standards, discussed further in Point II, *infra*, antitrust courts properly recognized a duty to provide access to local exchanges where essential to achieve competition in long distance and equipment markets. Indeed, the history of telecommunications markets teaches that regulatory attempts to introduce competition are aided – not impaired – by the existence of flexible antitrust responses to threats to competition. That is why Congress expressly preserved antitrust remedies when it adopted the 1996 Act.

1. *The network character of telecommunications markets and ILEC control of local exchanges pose threats to competition for*

1. *Application By Bell Atlantic-New York For Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services In the State of New York*, FCC Docket No. 99-295, filed Sept. 29, 1999, at 71 [hereinafter *"Bell Atlantic-New York § 271 Application"*] (emphasis added).

2. *In the Matter of Application By Bell Atlantic-New York For Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services In the State of New York*, Mem. Op. and Order, 15 F.C.C.R. 3953, ¶ 430 & n.1320 (Dec. 21, 1999) [hereinafter *"Bell Atlantic-New York § 271 Order"*].

which there is no single, obvious legal response. The incentive and opportunities for an ILEC to harm competition in telecommunications markets through refusals to deal are well-recognized. Telecommunications markets are network markets. In general, purchasers of telecommunications services buy the ability to connect with all other users of the network. Accordingly, a provider of telecommunications services must interconnect to other providers' customers. The need to interconnect eliminates the possibility of completely independent rivalry because rivals must cooperate in order to provide customers with the network connection they require. *See* Stephen Breyer, REGULATION AND ITS REFORM 287-314 (1982) (discussing centrality of "joint costs" in telecommunications markets). This inescapable market condition creates significant potential for an ILEC to interfere with its competitors.[3]

Virtually all telecommunications roads lead to and through an ILEC's local exchange network facilities. Competitors need access to, for example, switches (equipment directing calls to their destinations), local loops (wires connecting switches to telephones), and transport trunks (wires carrying calls between switches). As this Court has explained, "[i]t is easy to see why a company that owns a local exchange ... would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long distance calling as well." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 490 (2002). Thus, ILECs have unparalleled *opportunities* for anticompetitive behavior.

Moreover, because ILECs almost always compete in final product markets – they provide telephone services and generally seek to compete in other emerging telecommunications markets – they also have strong *incentives* to engage in anticompetitive behavior. As one commentator

3. For a fuller description of the market characteristics that have contributed to lack of competition in telecommunications markets, see, *e.g.*, FCC, *In the Applications of NYNEX Corp. Transferor - and - Bell Atlantic Corp. Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 F.C.C.R. 19985, ¶ 133 (Aug. 14, 1997); W. Baumol & J. Sidak, TOWARD COMPETITION IN LOCAL TELEPHONY (1994).

aptly put it, the "fundamental complicating phenomenon" in achieving competition in telecommunications markets is that the local exchange facilities, controlled by ILECs, "constitute inputs for the activities of the rivals of these firms in other arenas – inputs without which the rivals cannot hope to operate"; unconstrained by legal rules, an ILEC could "force rivals to bend to its will or . . . destroy those rivals altogether." Baumol & Sidak, *supra* n.3, at 7.

2. *Antitrust actions played an important role in opening up long distance and equipment markets to competition.* The history of incumbent resistance to competition in long distance and equipment markets is well known. Certain points bear emphasis, however, as they demonstrate the preeminent role antitrust tribunals played in opening telecommunications markets and underscore the dangers of relying on a single approach to achieve competition in this area.

After the FCC lowered regulatory barriers to competition in long distance and equipment markets, AT&T, then-owner of most local exchanges, allegedly used its control of those exchanges to raise rivals' costs in those markets. The FCC attempted to address competitors' concerns, using its regulatory tools.[4] When regulatory processes proved incapable of overcoming AT&T's opposition to competition, the United States and private parties used the antitrust laws to challenge entry barriers that AT&T had erected. *See S. Pac. Communications Co. v. AT&T Co.*, 740 F.2d 980 (D.C. Cir. 1984); *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983); *United States v. AT&T Co.*, 524 F. Supp. 1336 (D.D.C. 1981) .

In those actions, evidence showed that, although regulatory processes had been relatively effective in

4. *See, e.g., Carterfone*, 13 F.C.C.2d 420, 423-25 (1968) (declaring unlawful practice of prohibiting interconnection to customers who used competitors' equipment); *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), *reconsideration denied*, 21 F.C.C.2d 190 (1970) (permitting private line services); *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971) (declaring that there should be open competition in markets for certain "specialized" services). The FCC's market opening policy required some judicial prompting. *See MCI Telecomm. Corp. v. FCC*, 561 F.2d 365, 380 (D.C. Cir. 1977) (setting aside decision of FCC and permitting MCI to offer competitive services).

overcoming AT&T's categorical opposition to network access by competitors, the regulatory regime was unable to deal with AT&T's broader pattern of low-level conflict with potential competitors over access. *See United States v. W. Elec. Co.*, 673 F. Supp. 525, 530-531 (D.D.C. 1987). The *MCI* case, for example, demonstrated that despite regulatory oversight, AT&T refused to permit long distance carriers to interconnect to local exchanges; where AT&T permitted access, it imposed unnecessary or unwarranted costs on competitors; and it used regulatory processes to impose costs on competitors by raising groundless objections. *See* 708 F.2d at 1145-1153, 1156-1159. Similarly, in *United States v. AT&T*, the United States introduced evidence that AT&T had imposed unnecessarily expensive requirements on customers who sought to use competitors' phones or other equipment, 524 F. Supp. at 1348-1352, and on customers who sought to use rival long distance providers. *Id.* at 1353-1357. Federal antitrust enforcers also demonstrated that AT&T had delayed competitors' entry through groundless objections in regulatorily mandated negotiations over interconnection. *See id.* at 1356.

In response to such evidence, the courts drew on cases going back to this Court's decision in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), to recognize that antitrust law may impose affirmative duties to deal where such dealing is necessary to protect competition. *See S. Pac.*, 740 F.2d at 1008-1009; *MCI*, 708 F.2d at 1132-1133; *United States v. AT&T*, 524 F. Supp. at 1352-53.

In *MCI*, the Seventh Circuit adopted workable distinctions to identify those instances in which refusals to deal posed a sufficient threat to competition to be subject to antitrust, as opposed to only regulatory, scrutiny. The court held that access to local exchanges was essential to competition in long distance markets, and that AT&T's denial of access undermined competition without overriding business justification. 708 F.2d at 1133. Thus, the court invoked antitrust law to order interconnection. *Id.* At the same time, it declined to require AT&T to share its long distance lines, finding that competitors could build their own lines and that AT&T's denial of access therefore did not undermine competition. *Id.* at 1148. In the

United States' action, a consent decree was entered which sought to address anticompetitive incentives and access issues in long distance and equipment markets. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983). Only after these cases did wide-spread competition develop in long distance and equipment markets.[5]

3. *As Congress anticipated, antitrust can play an essential role in introducing and safeguarding competition in local telecommunications markets.* Efforts to jumpstart competition in local telecommunications markets began in earnest in the early 1990s. Inspired by the success of antitrust law in introducing competition into long distance and equipment markets, state legislators and regulators sought to transform local telephone service monopolies into competitive markets. Illinois passed a statute mandating that ILECs price unbundled wholesale services at long-run incremental prices and make them available to competitors on a nondiscriminatory basis.[6] Similarly, the New York State Public Service Commission required ILECs to develop a means to enable consumers to retain their telephone numbers when changing local service providers.[7]

The 1996 Act continues the process of promoting competition in telecommunications markets. Building on affirmative duties of access recognized in *MCI* and other antitrust decisions, Congress created a regulatory scheme to codify duties of access to local exchanges. Among other things,

5. *See, e.g.*, Zolnierek, Rangos & Eisner, Industry Analysis Division, Common Carrier Bureau, FCC, *Long Distance Market Shares-Fourth Quarter 1998, March 1999*, at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/mksh4q98.pdf (detailing entry by ATT&T's competitors from July 1984 through December 1998).

6. *See* 220 Ill. Comp. Stat. §§ 13-505.1, *et seq.* (1993); *see also* Calif. Pub. Util. Comm'n, *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers*, 33 C.P.U.C.2d 43 (1989).

7. New York Pub. Serv. Comm'n, *Proceeding on Mot. of the Comm'n to Examine Issues Related to the Continued Provision of Universal Service and to Develop a Framework for the Transition to Competition in the Local Exchange Market, Order Requiring Interim Number Portability, Directing a Study of the Feasibility of a Trial of True Number Portability and Directing Further Collaboration*, Case 94-C-0095, 1995 N.Y.P.U.C. LEXIS 70 (Mar. 8, 1995).

the 1996 Act requires ILECs to provide access to local exchange facilities on negotiated terms, 47 U.S.C. § 251(b) and (c); grants the FCC and state commissions the power to review terms of access, *id.* § 252(b); and provides aggrieved parties with a variety of remedies while specifically preserving antitrust claims, *see id.* §§ 152 (note), 206, 207; *see also In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, First Rep. and Order*, 11 F.C.C.R. 15499, ¶ 124-129 (Aug. 8, 1996) [hereinafter "FCC *First Rep. and Order*"].

The evidence on entry by competitors under the 1996 Act is mixed and inconclusive, however. In several major metropolitan markets, increased competition in services for large businesses has been encouraging, but the results in other markets are less impressive. Of the 38 states for which the latest FCC report provides data, ILECs' share of end-user switched access lines is still as high as 96% in one state (Kentucky) and over 90% in eleven others (Alabama, Connecticut, Indiana, Louisiana, Maryland, Mississippi, North Carolina, Ohio, Oregon, South Carolina, and Tennessee).[8] New York, Rhode Island, and Michigan have experienced the highest levels of entry by competitors, but even in those states, ILECs' shares remain at 75%, 78%, and 79%, respectively.[9] Equally important, in those states where there has been notable entry by competitors, gains have been heavily concentrated in limited geographic areas.[10] The States, however, have a vital interest in seeing that all their citizens benefit from competition in telecommunications markets, whether they live in smaller towns and cities or major metropolitan areas, and whether

8. FCC, *Local Telephone Competition: Status As Of December 31, 2002* (Table 6), at http://www.fcc.gov/Bureaus/Common_Carrier/ Reports/FCC-State_Link/IAD/1com0603.pdf.

9. *Id.*

10. *See id.* (map showing zip code areas where competitors have challenged ILECs and the number of competitors operating within those areas). Disparities in entry in different regions do not consistently follow population density patterns. *Id.* at 3 (noting that entry was more significant in Rhode Island, New Hampshire, Nebraska, and Utah than in California, Florida or Ohio).

they are residential telephone customers or businesses seeking high-end services.

Anticompetitive conduct may account for the mixed performance reflected in the data. A large number of antitrust actions have been filed alleging persistent anticompetitive behavior by ILECs.[11] The allegations are of a piece with those found to have had substance in the *MCI* and *AT&T* cases. In this case, for example, Respondent alleges that Verizon engaged in unjustified delays in establishing connections to the local exchange for competitors' customers. *See Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp.*, 305 F.3d 89, 95 (2d Cir. 2002). In *Covad Communications Co. v. Bell Atlantic Corp.*, a Verizon competitor alleges that when it sought to compete in providing high-speed network and data services, Verizon, among other things: fraudulently claimed that there was no room to collocate Covad's equipment in Verizon's central offices; required Covad to build unnecessary special rooms before collocating; delayed providing loops to Covad; and abused the regulatory and negotiation process to impede Covad's entry. 201 F. Supp. at 129-130 nn.10-17.

Competitors, in short, have alleged "death by a thousand cuts" at the hands of the ILECs. Even with the 1996 Act's prophylactic tools, ILECs can frustrate competition by raising the costs of rivals who seek access to local exchanges – as alleged in this and other cases – just as AT&T did a generation earlier when threatened by competition in long distance and equipment markets.

Although the 1996 Act provides regulatory means to address conduct that raises the costs of access to local exchanges, there are limits to what the regulatory process can be expected to accomplish. As the current Chairman of the FCC has recognized, delays in regulatory action often "hinder[] companies from improving their existing offerings or from entering new markets that lie outside their traditional

11. *See, e.g., Cavalier Tel. Co. v. Verizon Va., Inc.*, 330 F.3d 176 (4th Cir. 2003); *Goldwasser*, 222 F.3d 390; *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002); *Covad Communications Co. v. Bell Atl. Corp.*, 201 F. Supp. 2d 123 (D.D.C. 2002), *appeal filed*, (May 6, 2002 D.C. Cir.) (No. 02-7057).

regulatory boundaries."[12] Federal and state regulators therefore face a difficult trade-off. On the one hand, they can quickly review applications and resolve discrete disputes between ILECs and competitors so that the parties can carry on with the business of competing. Or, they can devote the time and resources necessary to resolve complex technical and economic disputes with sufficient certainty to ensure that the ILEC does not impose unjustified costs on competitors.

As Congress recognized, the availability of antitrust enforcement helps to resolve this dilemma. With antitrust remedies available, regulators may, if appropriate within the parameters of their statutory and regulatory duties, limit certain proceedings. At the same time, if an ILEC's overall conduct *is* anticompetitive, government enforcers and aggrieved parties may bring an antitrust action. This complementary role has been recognized since the inception of the 1996 Act. In implementing the Act, the FCC explicitly stated that "predatory behavior . . . can be adequately addressed through our complaint process *and enforcement of the antitrust laws*."[13] In implementing Sections 251 and 252 of the 1996 Act, the FCC emphasized that "parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252," including "*the ability of persons to seek relief under the antitrust laws.*" *FCC First Rep. and Order, supra*, ¶¶ 124-129 (emphasis added).

Both regulators and regulated firms, in proceedings under Section 271 of the 1996 Act, have acknowledged this connection between regulatory efficiency and the availability of antitrust enforcement. As the FCC explained in approving Verizon's Section 271 application for New York State:

> [I]t is important to evaluate the benefits of these reporting and enforcement mechanisms in the

12. Hearing Before the Subcomm. on Communications of the Sen. Comm. on Commerce, Science and Transport., 105th Cong. (1998) (statement of Michael K. Powell, Commissioner, FCC) , 1998 FCC LEXIS 2764, at *9.

13. *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 F.C.C.R. 15756, 15831 (April 17, 1997) (emphasis added).

> context of other regulatory and legal processes that provide additional positive incentives to Bell Atlantic [*i.e.*, Verizon]. . . . [W]e recognize that the Commission's enforcement authority under section 271(d)(6) already provides incentives for Bell Atlantic to ensure continuing compliance with its section 271 obligations. We also recognize that Bell Atlantic may be subject to payment of liquidated damages through many of its individual interconnection agreements with competitive carriers. *Furthermore, Bell Atlantic risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner.*[14]

Verizon shared this view when, in its Section 271 application for New York, it opposed more stringent regulatory restrictions and assured the FCC that competitors could resort to antitrust enforcement if the proposed safeguards did not prevent it from harming competition.[15]

II. An ILEC's Refusal To Deal With Rivals May Result In Section 2 Liability If The Refusal Is Likely To Maintain Or Extend The ILEC's Monopoly Power And Is Unnecessary To Achieve Overriding Efficiency Benefits

The court of appeals held that, assuming the truth of the allegations, Verizon might be found to have violated Section 2 by engaging in exclusionary or predatory conduct to maintain its monopoly power over local telecommunications markets. In particular, the court found that the allegations in the complaint are consistent with an exclusionary refusal to deal under either the essential facilities doctrine or a monopoly leveraging theory.

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14. *Bell Atlantic-New York § 271* Order, *supra* n.2, at ¶ 430 & n.1320 (emphasis added). The FCC reiterated this position in Section 271 approvals in other States. *See, e.g., In the Matter of Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecomm. Act of 1996 To Provide In-Region InterLATA Services in Texas, Mem. Op. and Order*, 15 F.C.C.R. 18354, ¶ 421 & n.1222 (June 30, 2000); *In the Matter of Joint Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Ga. and La., Mem. Op. and Order*, 17 F.C.C.R. 9018, ¶ 296 & n.1144 (May 15, 2002).

15. *Bell Atlantic-New York § 271 Application, supra* n.1, at 71.

Recognizing that Respondent's claim cannot be dismissed on the pleadings using the fact-specific criteria for exclusionary conduct developed by this Court, Verizon and the United States propose a new test. Unilateral conduct, they contend, may not be condemned as exclusionary unless it "make[s] no business sense apart from enabling monopoly returns" (Pet. Br. at 20; U.S. Br. at 15-17). By ignoring the potential impact on consumers and the market, and by focusing entirely on whether Verizon could have a lawful business objective – specifically, whether the refusal to deal could be profitable apart from enabling monopoly returns – the proposed test ignores nearly a century of Section 2 jurisprudence. If adopted, Verizon's test would undermine the central objective of antitrust law itself – enhancing consumer welfare.

A. Section 2 Precedents Establish the Need for a Fact-Intensive Inquiry to Determine Whether Conduct Is Exclusionary

Unlawful monopolization under Section 2 requires proof of two elements: "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966). The first element is not at issue here. Conduct that satisfies the second element is variously referred to as "exclusionary . . . or anticompetitive . . . or predatory." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).

"[A]nticompetitive strategic behavior by dominant firms comes in many kinds, many of which may not be known or even anticipated today." III P. Areeda & H. Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES ¶ 651i, at 88 (2002). Appropriately then, the test for exclusionary conduct is fact-specific. Early in the Sherman Act's history, this Court recognized that Section 2 was "intended to supplement [Section 1 of the Sherman Act, 15 U.S.C. § 1] and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded." *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). As in Section 1 cases,

"the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of [Section 2] have been committed[] is the rule of reason." *Id.* at 62.

Reflecting the parallels between rule of reason analysis under Sections 1 and 2, in determining whether conduct violates Section 2, this Court has instructed courts "to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605. Merely showing that a challenged practice harms individual rivals, or even that it reduces the overall level of competition, is not sufficient to prove a Section 2 violation, just as it is insufficient to establish Section 1 liability. The challenged practice may have pro-competitive benefits. It may offer product improvements or choice, or increase economic efficiency, thus rendering markets more, rather than less, competitive. Nevertheless, conduct may be condemned as exclusionary if it achieves pro-competitive benefits "in an unnecessarily restrictive way." *Id.* at 605 n.32 (quoting III Areeda & Turner, *supra*, at 78 (1978)). Under the rule of reason standards that underpin both Section 1 and Section 2, the inquiry focuses on "the competitive effects of challenged behavior relative to such alternatives as its abandonment or a less restrictive alternative." VII Areeda & Hovenkamp, *supra*, ¶ 1500, at 336-37 (2003).

Thus, the proper standard is appropriately summarized as follows:

> Exclusionary conduct is acts that (1) are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either . . . do not benefit consumers at all, or . . . are unnecessary for the particular consumer benefits that the acts produce, or . . . produce harms disproportionate to the resulting benefits.

III Areeda & Hovenkamp, *supra*, ¶ 651j, at 88-89. Applying this analytical framework, the courts of appeals have detailed the burdens of proof that it suggests: (1) a plaintiff is required

to demonstrate anticompetitive effect; (2) if the plaintiff does so, the burden shifts to the defendant to demonstrate a pro-competitive justification; and (3) if the defendant does so, the plaintiff may still prevail if it demonstrates that the challenged conduct is not necessary to achieve the consumer benefits conferred or that the harm to competition is disproportionate to the benefit conferred. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (*en banc*).

Under this analytical approach, properly plead allegations that an ILEC is interfering with a rival's access to a local exchange so as to raise the rival's costs – and thereby maintain or extend power over price – cannot be dismissed on the pleadings. *See Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 468-69 (1992); *see generally* T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L.J. 209, 234-35 (1986).

B. Verizon's Exclusionary Conduct Test Finds No Support in Section 2 Precedents or in Underlying Antitrust Principles

In an attempt to secure dismissal without any examination of market conditions or a determination that the challenged conduct is necessary to achieve overriding pro-competitive justifications – matters that cannot be resolved on the face of a complaint – Verizon and the United States urge this Court to discard the existing analytic framework developed under Section 2. They propose, instead, to replace this Section 2 jurisprudence with a new test: Unilateral conduct, they contend, may not be condemned as exclusionary unless it "make[s] no business sense apart from enabling monopoly returns" (Pet. Br. at 20).[16] Restating its proposed test, Verizon writes: "[i]f the conduct is sustainable by the defendant

16. Strictly speaking, the United States refers to conduct that lacks business sense "apart from its tendency to impair competition," or "to eliminate or lessen competition" (U.S. Br. at 17, 19). Whether this is intended to express something different than Verizon's "enabling monopoly returns" characterization is unclear, but we assume no difference. Also, perhaps recognizing the novelty of the test, the United States would limit it to the context in which the alleged exclusionary conduct is a refusal to deal with rivals (U.S. Br. at 17).

without monopoly profits, i.e., it makes business sense without the prospect of monopoly profits, then it is 'valid,' 'normal' conduct" (Pet. Br. at 22-23; *see also* U.S. Br. at 17).

Relying on this premise, Verizon asserts that its denial to a rival of access to a local loop could never violate Section 2 because "[w]hat is challenged is Verizon's alleged failure to provide adequate access at forced discounts to rivals . . . to help them sever Verizon's relationship with its retail customers . . . . It is granting . . . access, with the ensuing severance of important customer relationships, that requires a sacrifice that no ordinary competitor would freely make" (Pet. Br. at 26, 27). Having thus offered "economic sense" – that is, a colorable motive – for its refusal to deal, according to Verizon, the case is over (*see also* U.S. Br. at 20 ("a refusal to sell an input to a rival when it requires an incumbent to forfeit profits would make obvious business sense")). This argument ignores nearly a century of Section 2 jurisprudence.

1. Verizon's proposed test ignores the special concern this Court has shown for unilateral conduct by a dominant firm. This Court has recognized that "the right of a monopolist to deal with whom he pleases" is "qualif[ied]." *Aspen Skiing*, 472 U.S. at 603; *see United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Thus, "practices that harm rivals unnecessarily may be violations of § 2 when committed by a dominant firm, even though they would not be violations of other provisions when no dominant firm is involved." III Areeda & Hovenkamp, *supra*, ¶ 651h, at 87; *see also Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (recognizing that "[b]ehavior that might otherwise not be of concern to the antitrust laws – or that might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist").

Judge Wyzanski's seminal monopolization opinion in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), illustrates the shortcomings of Verizon's test. There, the court reviewed United Shoe's restrictive leasing practices for shoe-manufacturing machinery, which it found to be "the sorts of

activities which would be engaged in by other honorable firms." *Id.* at 344. Judge Wyzanski nevertheless held the practices illegal because, when engaged in by a monopolist, "they unnecessarily exclude actual and potential competition." *Id.* at 345. Under Verizon's test, the anticompetitive effect of United Shoe's leasing practices would have been irrelevant; the fact that the defendant's conduct made "business sense" would almost certainly have shielded it from Section 2 liability. *See also United States v. Griffith*, 334 U.S. 100, 108-09 (1948) (acknowledging that "[l]arge-scale buying is not . . . unlawful *per se*" because it "may yield price or other lawful advantages to the buyer," but holding that such large-scale buying by a motion picture circuit violated Section 2 because it extended monopoly power).

2. Verizon's proposal also disregards prevailing law on intent in Section 2 cases. The test's leading academic proponents acknowledge that an approach that focuses on whether the conduct could be profitable apart from monopoly returns is designed to isolate circumstances where the only possible conclusion is "that the firm's . . . action was motivated by the desire for the monopoly profits attendant on the exit of the rival." J. Ordover & R. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L. J. 8, 13 (1981). The test would therefore insulate a monopolist from any monopolization claim unless the plaintiff could plead facts establishing a sole and specific intent by the monopolist to exclude competition or control price.

But in *United States v. Aluminum Co. of America ("Alcoa")*, the Second Circuit, in a decision by Judge Hand, declined to limit Section 2 violations to conduct "actuated solely by a desire to prevent competition." 148 F.2d 416, 431 (2d Cir. 1945). This Court has since agreed: although in an *attempted* monopolization case, "it is necessary to prove a 'specific intent' to accomplish the forbidden objective – as Judge Hand explained, 'an intent which goes beyond the mere intent to do the act'" – in an *actual* monopolization case, "evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary.'" *Aspen Skiing*, 472 U.S. at 602 (quoting *Alcoa*, 148 F.2d at 432); *see generally* ABA Antitrust Section, ANTITRUST LAW

DEVELOPMENTS 248 (5th ed. 2002) ("[M]ore recent decisions focus on intent only as bearing on probable effect").

3. The test proposed here would undermine the central objective of antitrust law itself — enhancing consumer welfare. *See generally Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (explaining that "Congress designed the Sherman Act as a 'consumer welfare prescription.'") (quoting R. Bork, THE ANTRITRUST PARADOX 66 (1978)). As this Court instructed in *Aspen Skiing*, "impact on consumers" is relevant to determine whether challenged conduct is exclusionary. 472 U.S. at 605. Yet the test here is indifferent to the real-world impact of the challenged conduct on prices to consumers; it applies *"despite the fact that consumers are worse off as a result."*[17]

By way of hypothetical, suppose that an ILEC redesigns the interfaces of its switching equipment at a cost of $5,000 per switch, but is able to sell the new equipment for $6,000 per switch. Assume further that the change will cost rivals, who must access its switches, $50,000 per switch, an amount that puts rivals at an insurmountable competitive disadvantage. Because the only question that Verizon's test would address is whether the investment is profitable for the ILEC apart from enabling monopoly returns — and on these facts, it is — a Section 2 challenge would necessarily fail. Our hypothetical is analogous to what AT&T did when it required customers of rival equipment manufacturers to lease prohibitively expensive "protective connecting arrangements" before connecting to the local exchange network. *See, e.g., United States v. AT&T*, 524 F. Supp. at 1349. According to Verizon and its *amici*, no amount of harm to competition or consumers would condemn the conduct in this scenario.

The United States, by contrast, acknowledges that as a general matter, exclusionary conduct may be found where "the harm to competition" is "disproportionate to consumer benefits (in terms of providing a superior product, for example)

17. J. Ordover & R. Willig, *Access and Bundling in High-Technology Markets* 103-128, at 112, in COMPETITION, INNOVATION, AND THE MICROSOFT MONOPOLY: ANTITRUST IN THE DIGITAL MARKETPLACE (J. Eisenach & T. Leonard eds. 1999) (emphasis added).

and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition)" (U.S. Br. at 14). But, according to the United States, when a defendant is alleged to be under a duty to deal with a rival, "the inquiry into whether conduct is 'exclusionary' or 'predatory' requires a sharper focus" (*id.* at 15). Then, the United States argues, "conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition" (*id.* at 15). This radical change in Section 2 standards is warranted, the United States asserts, because exposing monopolists to liability for refusing to deal with rivals rarely offers procompetitive benefits, while frequently risking collusion and the dampening of incentives for investment (*id.* at 17).

The history of anticompetitive conduct and antitrust enforcement in telecommunications markets undercuts the United States' unsupported assertions. The findings in antitrust actions in this area demonstrate that unjustified refusals to deal by ILECs have served to maintain monopoly power. And the remedies afforded in those actions opened markets to investment and competition without requiring unnecessary sharing of facilities. *See United States v. AT&T*, 552 F. Supp. at 226-234 (approving consent decree opening long distance markets to investment); *MCI*, 708 F.2d at 1133, 1148 (drawing the line between necessary and unnecessary sharing). Because the test proposed by the United States disregards this Court's Section 2 standards and antitrust law's core goal, it does not sharpen — it dulls — the necessary inquiry.

4. As support for their exclusionary conduct test, both the United States and Verizon cite the test for predatory pricing, adopted by this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (U.S. Br. at 16; Pet. Br. at 22). The predatory pricing analogy, however, is unpersuasive.

As the *Matsushita* Court noted, "cutting prices . . . [is] the very conduct the antitrust laws are designed to protect." 475 U.S. at 594. Every price cut confers immediate benefits on consumers. At the same time, the price cutter – who is, in the predatory pricing model, selling below cost – must endure on-going and mounting economic loss until rivals are eventually driven from the market. A failed effort is, therefore, costly to the perpetrator. *See id.* at 595. Even the ultimate result is uncertain because, after bearing the economic pain along the way, when the predator finally excludes rivals and achieves the theoretical opportunity to raise prices, it is gambling that doing so will not induce entry by excluded or, indeed, new rivals. For all these reasons, there is "a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 589.

By contrast, the consumer benefits of a dominant firm's refusal to deal with rivals cannot properly be assessed without analyzing market conditions. Depending on the context, a refusal to deal may entrench or extend monopoly power without offering significant pro-competitive benefits. Equally important, the dominant firm can realize immediate revenue from the refusal to deal, and thus is in a fundamentally different position than a predatory pricer. *See* T. Krattenmaker & S. Salop, *Economic Concepts and Antitrust Analysis: A Critical Reexamination*, 56 ANTITRUST L. J. 71, 73 (1987) ("In contrast to predatory pricing, where the dominant firm loses money faster than its smaller victims, [refusals to deal by the dominant firm] can raise rivals' costs disproportionately."). Accordingly, predatory pricing schemes bear no comparison to refusals to deal and offer no support for Verizon's arguments.

C. Although Verizon's Exclusionary Conduct Test May Have Limited Value, Section 2 Claims Are Not Susceptible to a "One Size Fits All" Approach.

The exclusionary conduct test offered here would radically depart from Section 2 precedents. That is not to say, however, that it is devoid of all value. The showing that the test contemplates may well be sufficient to establish liability. But, as we have demonstrated, any attempt to use the test to

create a *necessary* condition of Section 2 liability is untenable, even if, as the United States proposes, the new test were limited to refusals to deal with rivals.

There may be circumstances in which the monopolist can be proven to have engaged in conduct that has no colorable business explanation, except to enable monopoly returns. Where those are the facts, liability under Section 2 should generally follow. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), can be viewed as such a case. There, the Court upheld Section 2 liability on the basis of a lower court finding that the defendant power company's sole motive for refusing to deal was "to prevent the municipal power systems from eroding its monopolistic position." *Id.* at 378. Because the court found that its only business objective was to obtain monopoly returns, the power company's refusal to deal flunks the test proposed by Verizon and the United States. Section 2 liability was properly imposed.

Otter Tail reflects that the proposed test can identify cases of clear illegality. But even so, the test raises significant questions that neither Verizon nor the United States address. For example, neither commits itself clearly on whether, in going through the necessary analysis, one includes, as a justifiable benefit to the monopolist, profits from customer sales that the monopolist's exclusionary conduct captures from the injured rival. Verizon suggests that it may include these profits on the theory that "sever[ing] . . . important customer relationships . . . requires a sacrifice that no ordinary competitor would freely make" (Pet. Br. at 27). However, if this were the correct analysis, then even the naked refusal to deal in *Lorain Journal Co. v. United States* would escape condemnation. In that case, the monopolist newspaper had "practically indispensable coverage" of those persons whom an advertiser would want to reach in the relevant market, and its pages were therefore "essential" for many advertisers. 342 U.S. 143, 148, 149-50 (1951). The newspaper refused to deal with advertisers who used the services of its potential rival, a newly established radio station, thereby assuring itself of continued profits from advertisers captured from its excluded rival. Because there was no countervailing procompetitive justification for the newspaper's conduct, to

allow it to use these captured profits to escape Section 2 liability would denude the statute of serious content in the refusal to deal context. Indeed, were profits captured by means of the challenged conduct allowable as a justifiable benefit to the monopolist, *Otter Tail* itself would have been decided differently, for the justification which Verizon here proposes – retaining customers – is precisely the justification rejected by this Court in *Otter Tail*. *See Otter Tail*, 410 U.S. at 380 (rejecting Otter Tail's justification that "without the weapons which it used, more and more municipalities will turn to public power and Otter Tail will go downhill").

Similarly, neither Verizon nor the United States explain whether application of the test requires exclusion of the incremental profit to the monopolist that comes from protecting an existing monopoly price against erosion from competition by the excluded rivals.[18] Yet, like captured profits, this exclusion from the profit analysis is necessary. Profits captured by nakedly exclusionary conduct, such as protecting an existing monopoly price, cannot justify otherwise anti-competitive conduct. A business justification "does not succeed [in avoiding Section 2 liability] merely because it is profitable, for one can profit from both competitive and monopolistic acts." III Areeda & Hovenkamp, *supra*, ¶ 658f, at 131.

While the test may have some uses, if it had been a necessary criteria for exclusionary conduct, many of this Court's Section 2 cases likely would have been decided differently. The monopolist in *Aspen Skiing* put forward potentially plausible business justifications for its conduct, which the jury rejected at trial. *See* 472 U.S. at 608-11. Kodak did as well, and secured a favorable summary judgment that this Court reversed. *See* 504 U.S. at 482-86. Under Verizon's and the United States' exclusionary conduct

18. Failure to recognize this profit element would be akin to adopting the "Cellophane Fallacy," *see United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), where the Court used elasticity of demand at current prices – without regard for whether the defendant already priced at monopoly levels – in the market definition analysis. *See generally* W. Landes & R. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 961, 970-71 (1981); *Kodak*, 504 U.S. at 471 ("'The existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power.'") (quoting Areeda & Kaplow, *supra*, ¶ 340(b)); ABA Antitrust Section, *supra*, at 542 n.56 (citing additional authorities).

test, it is doubtful that either case could have survived a motion to dismiss. Thus, Verizon's test would provide cover for a broad range of practices that this Court has determined may maintain or extend monopoly power.

In sum, the exclusionary conduct test could be a useful analytic tool for a limited number of situations where the conduct at issue is necessarily pernicious to competition. In this respect, the test might be thought of as identifying a kind of per se Section 2 violation – a rough analog to the per se rule of Section 1. But while the test can discern naked anticompetitive conduct, where a dominant firm's refusal to deal is not demonstrably senseless except to enable monopoly returns – and most Section 2 cases are likely to fall within this category – the test offers no help. It does not assist in resolving Section 2 claims where the motive for the exclusionary conduct includes both pro- and anti- competitive elements, and where the marketplace effects are similarly mixed. For that, the lower courts need what this Court has already developed: a fact-based inquiry that enables the court to probe both anticompetitive consequences – which may include, but are not limited to, foregoing short-term revenue for the long-term objective of monopoly returns – and procompetitive benefits. Verizon's exclusionary conduct test, by contrast, would discard *Standard Oil* and the many decisions since then, which emphasize the complementary relationship between Sections 1 and 2 and the parallel fact-based inquiries applicable under each statute. The lawfulness of Verizon's conduct may, of course, be established on summary judgment or at trial. However, as the court of appeals below recognized, at this juncture in the case, dismissal is inappropriate.

D. An ILEC's Obstruction Of Access to its Local Exchange May Be Actionable under the Essential Facilities Doctrine.

This Court's decision in *Terminal R.R. Ass'n*, 224 U.S. 383, is the foundation for the essential facilities doctrine. It identifies a circumstance in which a monopolist's refusal to deal threatens to harm competition unnecessarily and may therefore be exclusionary under Section 2. The Seventh Circuit

in *MCI* more specifically articulated the doctrine's elements: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the facility to a competitor; and (4) the feasibility of providing the facility. *See* 708 F.2d at 1132-1133. The Second Circuit drew on these authorities in sustaining Respondent's claim. *Trinko*, 305 F.3d at 107-08.

The United States criticizes (U.S. Br. at 20-23) the Second Circuit's reliance on the essential facilities doctrine because its ruling allegedly "dispense[d]" with Section 2's exclusionary conduct requirement. Verizon argues (Pet. Br. at 41-42) that the doctrine should be limited to situations where the defendant voluntarily provides access to some, but not all, competitors. The Second Circuit allegedly erred by ignoring this limitation and then, left without a benchmark against which to measure exclusionary conduct, by substituting the regulatory duties required under the 1996 Act.

However, as applied here, the essential facilities doctrine comports with established Section 2 analysis and is well suited to discern anticompetitive conduct in the telecommunications market. Moreover, the Second Circuit did not blindly import regulatory duties into Section 2; it left the reasonableness of the specific terms of network access that might be required under antitrust law, as well as the accommodation between the 1996 Act and antitrust duties in general, for the district court to resolve on remand.

1. As *MCI* and *United States v. AT&T* illustrate, the essential facilities doctrine is suited for telecommunications markets because dominant firms control inputs (local exchanges), which can be essential to any competition, and access to those inputs need not burden the dominant firms unduly. *See MCI*, 708 F.2d at 1133; *United States v. AT&T*, 524 F. Supp. at 1353.

While the essential facilities doctrine is not without critics, its value in addressing unique conditions in telecommunications network markets is generally acknowledged. For example, the late Professor Areeda wrote that *MCI*, "which rests on the essential facilities notion, is probably correct." Philip Areeda, *The "Essential Facility"*

Doctrine: An Epithet in Need of Limiting Principles, 58 ANTITRUST L. J. 841 (1989); *see also* IIIA Areeda & Hovenkamp, *supra*, ¶ 787c1 (2002) (noting the doctrine's "relevance in regulated monopolies when it serves to limit the monopolist's power to expand the monopoly into 'adjacent' unregulated (or less regulated) markets").

While the doctrine is useful in identifying exclusionary conduct, it is applied with great restraint: "[c]ourts rarely impose liability . . . , in large part because the doctrine requires a showing that the facility controlled by the defendant firm is truly *essential* to competition — *i.e.*, constitutes an input without which a firm cannot compete with the monopolist." R. Pitofsky, D. Patterson & J. Hooks, *The Essential Facilities Doctrine Under U.S. Law*, 70 ANTITRUST L. J. 443 (2002). By requiring both that an input be essential and that the competitor be unable practically or reasonably to duplicate the facility, courts filter out cases where harm to competition is unlikely. *See, e.g., Paladin Assocs. Inc. v. Montana Power Co.*, 328 F.3d 1145, 1163 (9th Cir. 2003) (noting that to be "essential," the facility must afford "the power to eliminate competition in a downstream market"). Accordingly, the lower courts frequently grant summary judgment or dismissal on this basis,[19] or where denial of access was necessary for the defendant to compete on the merits.[20] Dismissal is not warranted here, however, because the claimed harm to competition is not facially implausible; nor is it self-evident that Verizon's business needs justify denying access.

19. As illustrations of non-essential facilities, see *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568-70 (2d Cir. 1990) (advertising space in leading magazine); *Laurel Sand v. CSX*, 924 F.2d 539, 544-45 (4th Cir. 1991) (lease terms for railroad track usage); *Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612-13 (6th Cir. 1987) (telephone company's directory delivery, billing, and classification systems); *Midwest Gas Servs. v. Ind. Gas Co.*, 317 F.3d 703, 713-14 (7th Cir. 2003) (gas pipeline); *Paladin Assoc.*, 328 F.3d at 1163 (pipeline); *Malden v. Union Elec. Co.*, 887 F.2d 157, 161-62 (8th Cir. 1989) (power lines); *McKenzie v. Mercy Hospital*, 854 F.2d 365, 370-71 (10th Cir. 1988) (emergency room facilities).

20. *See, e.g., William v. Heartland Hosp.*, 34 F.3d 605, 612-13 (8th Cir. 1994) (terminating physician's staff privileges was based on reasonable needs); *Laurel Sand*, 924 F.2d at 545 (access to a railroad line was inconsistent with defendant's efficient business operations).

2. Verizon also argues that the doctrine should not apply where the defendant denies access to the essential facility to *all* those seeking access, but instead only where a monopolist discriminates – voluntarily providing access to some, but not to others. This would turn basic antitrust on its head. Where other competitors receive access to the essential facility, the likely harm to competition of denying access to one *more* competitor would not seem as great as when all competitors are denied access. Applying the doctrine in these circumstances, while rejecting it where the essential facility is closed to *all* competitors – as Verizon urges – would surely not improve on the current state of affairs. *See MCI*, 708 F.2d at 1133.

3. The United States argues that in applying the essential facilities doctrine, the court of appeals equated regulatory duties under the 1996 Act with conduct required by the antitrust laws. Specifically, the court of appeals is said to have equated the "reasonable terms" applicable to access under the essential facilities doctrine with the access terms mandated by the 1996 Act. This, the United States maintains, could not be sound: The 1996 Act requires ILECs to grant access to local network facilities at rates below the monopoly prices that ILECs otherwise could charge, whereas a monopolist's refusal to sell below the monopoly price would not "ordinarily" be actionable (U.S. Br. at 3 n.1, 23).

The court of appeals, however, merely recognized that the reasonableness of local network access, as well as the accommodation between the 1996 Act and antitrust duties, implicate fact issues, which a Rule 12(b)(6) motion is unsuitable to resolve. *See Trinko*, 305 F.3d at 108. To decide such questions, the district court needs the benefit of evidence probative of the conduct alleged to be exclusionary, the conditions associated with access, the justifications for its denial, and the impact of the 1996 Act regulatory scheme itself. *See* IA Areeda & Hovenkamp, *supra*, ¶ 240(d), at 15, 17 (1997) ("even when conduct is not exempt from antitrust laws, regulation of a market can bear heavily on the application of antitrust principles"); *S. Pac.*, 740 F.2d at 1001 (holding that the district court erred "in failing to consider the realities of the regulatory scheme . . . [which] leaves pricing and interconnection decisions to AT&T in the first instance").

The United States advocates shortcutting this necessary factual inquiry, citing the approach taken in *Goldwasser*, 222 F.3d 390. There, the Seventh Circuit dismissed at the pleading stage a complaint comparable to the complaint in this case. Although the *Goldwasser* court recognized that the 1996 Act affords no antitrust immunity, it nevertheless dismissed on the ground that the 1996 Act imposes "affirmative duties to help one's competitors that . . . do not exist under the unadorned antitrust laws." *Id.* at 400 (citations omitted). That approach insulates interconnection disputes from antitrust review just as effectively as a statutory or implied immunity would. It gives dispositive effect to judicially noticed "facts" about the conduct alleged and the regulatory environment, which cannot be determined on the pleadings alone, and it relies on unprecedented restrictions on Section 2's scope.

The *Goldwasser* approach would dismantle the complementary system that Congress erected in the 1996 Act to promote competition in local telecommunications markets. Virtually any monopolization claim arising from an ILEC's denial of access to its local exchange networks would be subject to a Rule 12(b)(6) dismissal. That is not what Congress – mindful of the lessons of history – intended. In cases such as this, the essential facilities doctrine is reasonably calculated to identify denials of access by regulated monopolists that are likely to harm competition unnecessarily and are therefore exclusionary.

E. A Monopoly Leveraging Claim Is Proper When an ILEC Obstructs Interconnection in Ways That Unnecessarily Threaten Harm to Competition and Consumers.

Verizon and the United States criticize (Pet. Br. at 26-27; U.S. Br. at 26-27) the Second Circuit's monopoly leveraging ruling because it allegedly imposes liability for the mere "use" of monopoly power, and fails to require exclusionary conduct. *See Trinko*, 305 F.3d at 108. But when an ILEC obstructs access to the local loop through anticompetitive conduct, thus threatening to raise costs or to decrease quality or output of retail telephone service in downstream markets, a monopoly leveraging claim may be pled. The ILEC's conduct is

appropriately actionable because it threatens the very harm that Section 2, and its exclusionary conduct requirement, seek to prevent.

"Tangible harm" to competition and consumers may occur even absent circumstances that reflect actual or probable monopoly power in a secondary market. If

> the defendant uses monopoly power in [market] A to place rivals in [market] B at a competitive disadvantage, perhaps by raising their costs or making their offerings less attractive . . . the defendant does not threaten a market *share* that we ordinarily associate with monopoly, but it clearly threatens those things commonly identified as economic monopoly, namely higher prices or reduced output or quality.

III Areeda & Hovenkamp, *supra*, ¶652c, at 96. Those effects may well occur where an ILEC, by anticompetitive means, frustrates a competitor's interconnection efforts.

The court of appeals thus correctly invoked the monopoly leveraging doctrine, as developed in two recent circuit decisions. *See Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 272-73 (2d Cir. 2001); *Ad/Sat v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999). Both cases heeded the teaching of *Spectrum Sports v. McQuillan*, 506 U.S. 447, 559 (1993), and limited the leveraging doctrine accordingly.[21] In *Virgin Atlantic*, on which the court of appeals principally relied, the Second Circuit ruled that a monopoly leveraging claim required a showing that monopoly power was used to gain a competitive advantage in a distinct market which "threatened the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share." 257 F.3d at 272 (quoting III Areeda & Hovenkamp, *supra*, ¶ 652). The Second Circuit has also made clear that the doctrine requires "predatory or anticompetitive conduct," rather than actions which

21. The monopoly leveraging doctrine itself traces its origins to *Griffiths*, 334 U.S. 100, and *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), which the court below did not cite.

presuppose only efficient size or integration. *Id.* at 273. In *AD/Sat*, the Second Circuit similarly limited the doctrine "to those circumstances where the challenged conduct actually injures competition, not just competitors, in the second, non-monopolized market." 181 F.3d at 230. In view of these limitations on the doctrine's scope, the United States' argument (U.S. Br. at 27) that the Second Circuit's ruling below would proscribe "the use of monopoly power as such" is strained.

In sum, a monopoly leveraging claim thus circumscribed is consistent with this Court's statement in *Spectrum Sports* that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." 506 U.S. 447, 459 (1993). The Court was not there addressing whether an "*actual* monopolist violates § 2 by conduct bringing a non-monopolistic advantage in a secondary market." III Areeda & Hovenkamp, *supra*, ¶ 652. Where an actual monopolist, such as an ILEC, obstructs its competitors' interconnection, it can inflict substantial injury on consumers in downstream markets, where the ILEC itself competes. These are market conditions to which monopoly leveraging applies because the harm is of the type that the antitrust laws are intended to prevent.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF Z-TEL TECHNOLOGIES, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE

Z-Tel Technologies, Inc. ("Z-Tel") provides telephone service, through its subsidiaries, to more than 250,000 customers in 47 states. Z-Tel's substantial interest in this litigation arises from the company's unavoidable dependence on access to the local telephone networks acquired by the incumbent local exchange carriers ("incumbents"), including petitioner Verizon Communications, Inc. ("Verizon"), during decades of their existence as state-franchised monopolists. Adopting the position advanced in this case by Verizon and by the Department of Justice and the Federal Trade Commission (collectively, the "government") would have substantial, negative consequences for competitors and consumers. Z-Tel therefore respectfully submits this brief to assist the Court in resolving this litigation.

BACKGROUND

1. Z-Tel competes against incumbent local telephone companies by providing telephone service to residential and small-to-medium-sized business customers. Although Verizon erroneously describes competitors like Z-Tel as companies that merely seek to resell incumbent services, Z-Tel is no more a reseller of telephone service than General Motors is a reseller of steel. Z-Tel has invested more than $100 million in "vertical service" capabilities alone.[1] Z-Tel originally was conceived as a *software* company devoted to developing unique vertical services for the telephone. Today,

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[1] As incumbent SBC Communications, Inc. ("SBC") explained in a recent filing with the Securities and Exchange Commission, "vertical services" are "enhanced telephone services available to retail customers such as Caller ID, Call Waiting, and voice mail. . . . These services are not regulated by the FCC and are generally more profitable than basic local phone service." SBC Form 10-K Report (for fiscal year ending December 31, 2002), at 3-4 (available at http://www.shareholder.com/sbc/downloads/10-K_2002.doc).

its innovative offerings include voice-mail that may be accessed over the Internet; "find me" call-forwarding, which directs calls to multiple numbers when the first number dialed is not answered; and Z-Tel's newest innovation, "Personal Voice Assistant," a unified, voice-recognition messaging service that allows subscribers, simply by using their voice, (1) to make calls or retrieve contact information from their "Outlook" or other address book, and (2) to send voice messages by e-mail from any phone without using a computer.

As a consequence of decades of franchised monopoly and the incumbents' continuing dominance of the Advanced Intelligent Network platform,[2] the overwhelming majority of consumers purchase their vertical services from their local telephone service provider. To maximize Z-Tel's ability to compete for customers, the company expanded its original business plan to serve customers directly as a competitive local exchange carrier.[3]

To provide competitive telephone service, Z-Tel needs to lease "costly bottleneck elements" from the incumbents, "duplication of which is neither likely nor desired." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 515 (2002). Competitors cannot economically duplicate the entire local network of "loops," the actual lines running into homes and businesses. Competitors also need access to incumbents' switches because loops are typically "hard-wired" to those switches; it is economically infeasible to bypass that bottleneck using a high-capacity line unless a customer has at

[2] The Advanced Intelligence Network platform allows external computers to control call processing and to manage network information, enabling the provision of sophisticated vertical services.

[3] Z-Tel's most popular product is a "bundled" product that includes its innovative vertical services. *See* www.z-tel.com (describing "Z-LineHOME").

least 18 phone lines in a particular location.[4] Moreover, for technical and economic reasons, competitors that need access to an incumbent's switches also need access to its local transport and signaling.[5]

The incumbents' control of these facilities gives them "an almost insurmountable competitive advantage," so that a "newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network." *Verizon*, 535 U.S. at 490. In that regard, little has changed since 1983, when the Seventh Circuit concluded that "MCI could not duplicate Bell's local facilities" because it would not be "economically feasible." *MCI Communica-tions Corp. v. AT&T*, 708 F.2d 1081, 1133 (7th Cir. 1983).

2. The finished products Z-Tel sells are completely different from the inputs it buys from incumbents. Z-Tel's innovative vertical services are obviously different from the inputs (loops, switches, transport, and signaling).[6] But the inputs also differ from basic local voice services. Standing alone, the inputs represent only raw capacity, rather than a finished service. To provide local voice services, Z-Tel must combine the leased capacity with customer service, account

[4] Z-Tel discussed these issues in detail in publicly available comments filed at the Federal Communications Commission. *See* Comments of Z-Tel Communications, Inc., FCC CC Docket 01-338 (Apr. 5, 2002), at 28-56.

[5] The FCC recently rejected the incumbents' argument that competitors do not need access to incumbents' switches, transport, and signaling to provide service to residential and small business customers. *See* FCC Press Release, *FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers* (Feb. 20, 2003) ("FCC Press Release").

[6] Moreover, those vertical services are provided primarily by means of equipment based in Tampa, Florida, that Z-Tel does not lease from the incumbents.

management, and billing and collection. It must also undertake the complicated work of charging (and paying) other carriers for sending and receiving calls.[7] These activities may add as much to the cost of providing retail local voice services as do the inputs controlled by the incumbent.[8]

For most of the history of telephone service in the United States, local services were dominated by a single company, AT&T. In the 1980s, the break-up of AT&T permitted the long-distance market and the telephone equipment manufacturing market to become competitive. Local voice services, however, remained dominated by the Regional Bell Operating Companies that spun off from AT&T; these companies continued to provide local voice services as franchised monopolists.[9]

In adopting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), Congress sought to open local voice services to competition. Although incum-

[7] For example, when an AT&T customer or a Verizon Wireless customer calls a Z-Tel customer, Z-Tel may be entitled to collect a "terminating access" charge. Similarly, Z-Tel may owe another carrier when one of its customers calls a customer served by another carrier. Z-Tel operates a large call center and its account management staff constitutes a significant portion of Z-Tel's 1,200 employees.

[8] Z-Tel also provides these services at wholesale to other carriers seeking to provide competitive local service, including Sprint and, before its bankruptcy, MCI.

[9] Both before and after the break-up of AT&T, the FCC attempted to foster competition in "enhanced services" (including vertical calling services), recognizing that the "importance of the control of local facilities . . . cannot be overstated." *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 F.C.C.2d 384, 468 (1980); *see generally In re Computer II Further Remand Proceedings*, 14 FCC Rcd 4289 (1999) (describing the relevant FCC decisions). For vertical services, however, no significant competitive industry emerged to challenge incumbent monopolies until competitors like Z-Tel were allowed to provide competitive voice service.

bent resistance has greatly slowed the development of competition, approximately 14 million residential and small business customers have chosen to obtain service from a competitive local exchange carrier rather than an incumbent.[10] These customers apparently believe that competitive carriers offer differentiated services that are superior to those provided by the incumbent.

3. This case presents the question of whether federal antitrust claims may be stated against incumbents for refusing to deal with competitors that need access to incumbents' essential facilities to provide local voice services. The plaintiff in this case alleges a problem commonly encountered by Z-Tel and other competitive carriers—that Verizon, instead of flatly denying access to its facilities, *effectively* denied access by filling competitors' orders more slowly than its own.[11]

By undermining competitive access to their essential facilities, the incumbents seek to maintain their dominance over both local voice services *and* vertical services. Vertical services are particularly important to incumbents because such services are unregulated, and therefore offer incumbents "a higher profit margin than basic local service." *See, e.g., In re AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 21438, 21468 (1998) (quoting the brief of Ameritech—now part of SBC—in that proceeding). Vertical services allow new entrants to distinguish themselves with new and better services, permitting competitors the opportunity to add customers for both vertical and local voice services.[12] The

[10] Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2002* (June 12, 2003), Table 2.

[11] Pet. App. 6a. The case below was dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 51a. Accordingly, respondent's allegations must be taken as true at this stage.

[12] Z-Tel leases network elements—one of the three means of market entry noted by this Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S.

incumbents' efforts to foreclose competition in local voice services not only preserve their dominance (and the associated revenues) in that realm, but also eliminate competition (on both price and quality) in vertical services.

In this case, the Second Circuit concluded that the plaintiff had stated claims under Section 2 of the Sherman Act. First, by alleging that Verizon had denied reasonable access to its bottleneck facilities, the court concluded that the plaintiff had stated a claim under the essential facilities doctrine. Pet. App. 30a. Second, by alleging that Verizon was using its "monopoly power over a wholesale market . . . to gain a competitive advantage in a retail market in which telecommunications carriers sell local phone service to consumers," the court found that the plaintiff had stated a "monopoly leveraging" claim as well. Pet. App. 30a.

SUMMARY OF ARGUMENT

1. To provide its local voice and vertical services to customers, Z-Tel needs access to local telephone transmission facilities owned by incumbents. Although decades of state-sanctioned monopoly over local voice services ended with the passage of the Telecommunications Act of 1996, the incumbents intentionally seek to maintain their dominance in local voice services and vertical services by denying reasonable access to their essential facilities.

The incumbents' conduct violates Section 2. Of course, Section 2 does not broadly prohibit monopoly as such: the underlying premise of the law is that a general governmental proscription of monopoly is unnecessary because, in markets free from exclusionary and predatory conduct, competition will develop without intervention. Competition itself breeds competition and destroys monopolies.

366, 372 (1999)—rather than reselling the incumbents' services because it best permits Z-Tel to distinguish itself by offering both innovative vertical services and better customer service.

As this Court recognized in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), however, in certain circumstances the competition necessary to break down monopoly power cannot develop without intervention. Specifically, where essential facilities of the sort owned by the incumbents are involved, a monopoly may be preserved unlawfully and competition eliminated absent an affirmative requirement that the owner of essential facilities deal with competitors. In those narrow circumstances, Section 2's fundamental concern of *protecting the competitive process* requires the imposition of a duty to deal.

The essential facilities doctrine provides a sound basis for identifying the circumstances under which monopolists are required to deal with competitors. Properly construed, the doctrine requires owners of essential facilities that cannot reasonably or practically be duplicated—facilities the "duplication of which is neither likely nor desired," *Verizon*, 535 U.S. at 515—to deal with competitors on reasonable terms to allow the use of those facilities.

Unlike Verizon, which seeks a broad disavowal of the essential facilities doctrine, the government concedes that the doctrine may help to identify Section 2 violations. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner ("SG Br.") 22 n.6. Nevertheless, the government's "exclusionary or predatory conduct" standard would eviscerate the doctrine by permitting liability to be found only when a monopolist's "refusal to sell his goods or services below the monopoly price" makes no business sense. SG Br. 22-23. That novel standard incorrectly implies that competitors such as Z-Tel are merely "resellers" by ignoring the difference between finished local voice services and the essential facilities (*i.e.*, loops, transport, switching and signaling) used as inputs into the finished services. Although the antitrust laws might not always prohibit a monopolist from selling a finished retail

service at a monopoly price, that conclusion does not apply to the price of essential facility inputs needed by competitors to create retail services to compete with those offered by the owner of the essential facility. Indeed, there is *no* competitive price at which it would make "business sense" for the owner of an essential facility to sell access to that facility—hence the need for the essential facilities doctrine. In any event, the government's standard should be rejected because it relies on a disputed factual issue of market definition that cannot be resolved at the pleading stage.

The government also suggests that a monopolist's desire to protect revenues in its retail market justifies a refusal to provide reasonable access to essential facilities at wholesale. That argument fails under this Court's precedents. In *Otter Tail*, this Court squarely rejected the defendant's claim that its desire to protect its retail revenues justified its refusal either to sell power to the plaintiffs at wholesale or to allow its essential transmission facilities to be used to "wheel" wholesale power to the plaintiffs from other sources. Similarly, in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), this Court rejected the defendant's efforts to preserve its retail service revenues by refusing to sell parts to competitive service providers at wholesale.

2. Plaintiff's monopoly leveraging claim falls squarely within the traditional scope of Section 2. It "requires no extension of Sherman Act §2's basic coverage" to find liability when a company "forces customers of its *A* monopoly to purchase its *B* good rather than the good of any rival." P. Areeda and H. Hovenkamp, 3 *Antitrust Law* 95-96 (2d ed. 2002) ("Areeda & Hovenkamp"). That is precisely what the incumbents seek to do: they wish to use their monopoly over local voice services to force customers to buy profitable vertical services from them, rather than from competitive entrants.

This Court's decision in *Kodak* confirms that efforts by a company with a lawful monopoly to leverage its monopoly into dominance in another market are subject to scrutiny under Section 2. Further, even critics of monopoly leveraging acknowledge that a rate-regulated monopolist's efforts to expand its dominance in a regulated market into a related, unregulated market warrants concern. This case presents more compelling circumstances for stringent review of leveraging efforts than *Kodak* because the incumbents seek to extend their dominance in *regulated* local voice services into dominance over *unregulated* vertical services.

3. Section 2 applies even though the incumbents' efforts to undermine access to their essential facilities also may violate provisions of the 1996 Act. The antitrust savings clause in the 1996 Act expressly provides that the requirements of the Act do not "modify, impair, or supersede the applicability of the antitrust laws." 47 U.S.C. § 152 note.

Both Verizon and the government nonetheless suggest that the existence of the 1996 Act and the unbundling obligations that it imposes on incumbents shields incumbents from antitrust liability. That suggestion is simply wrong. Although a violation of the 1996 Act does not *automatically* create liability under the antitrust laws, violations of "extrinsic statutory or legal duties" may *support* a claim of monopolization or attempted monopolization under Section 2.

Moreover, contrary to Verizon's claims, the 1996 Act's creation of a regulatory regime to establish wholesale prices for bottleneck telecommunications facilities actually *removes* an alleged obstacle to application of the essential facilities doctrine. Under the Act, expert regulators already have determined wholesale prices—including a fair profit for incumbents—and courts adjudicating antitrust claims easily could rely on their determinations.

ARGUMENT

The antitrust causes of action pleaded in this case enjoy solid support in the precedents of this Court and the courts of appeals. The novel contentions of Verizon and the government lack merit because they would transform the market-opening provisions of the 1996 Act into a *de facto* exemption from antitrust scrutiny. This Court should affirm the decision of the Second Circuit and remand this case to the trial court so that the plaintiff may attempt to develop the evidence to support its well-pleaded allegations.

I. VERIZON AND THE GOVERNMENT RELY ON DISPUTED ISSUES OF FACT, WHICH CANNOT BE RESOLVED AT THE PLEADING STAGE, TO CHARACTERIZE POTENTIAL COMPETITORS INCORRECTLY AS MERE "RESELLERS."

Verizon's and the government's arguments rely on a fundamental misunderstanding of fact.[13] Contrary to those litigants' claims, new entrants like Z-Tel do *not* seek access to the incumbents' essential facilities so that they may "resell those services as mere marketers and middlemen." Brief for Petitioner ("Verizon Br.") 3. The essential elements of loops, local transport, switching, and signaling are basic transmission facilities that competitors need to deliver their finished services to consumers, but they are not themselves the finished services that consumers purchase. As the FCC stated, competitive carriers need access to the incumbents'

[13] *See, e.g.*, Verizon Br. 26 (incumbent monopolists cannot be forced to "provide . . . assistance at forced discounts to rivals, even mere resellers, to help them sever Verizon's relationship with its retail customers); SG Br. 20-25 (incumbent monopolists are entitled to insist on monopoly prices for their "goods or services"). As further discussed *infra* at 19-20, these claims improperly assume that competitors like Z-Tel are merely reselling incumbents' services.

facilities "to connect end user customers to the [competitive] carriers' equipment." *Review of the Section 251 Unbundling Obligations of Incumbent Carriers*, Notice of Proposed Rulemaking, 16 FCC Rcd 22781, 22804 n.111 (2001). Once "connected" to customers, competitors provide innovative new vertical and bundled telecommunications offerings, and also offer better customer service and more convenient billing.

Z-Tel perfectly illustrates this point. As noted above, Z-Tel began as a software company, dedicated to developing new vertical services for the telephone; its services now include a unique "Personal Voice Assistant," as well as sophisticated voice-mail and call-forwarding features. These innovative services reside on Z-Tel's computers in Tampa, Florida. Although Z-Tel requires access to incumbents' essential transmission facilities "to connect end user customers to . . . [that] equipment," Z-Tel clearly does not merely "resell" the vertical services described above; rather, Z-Tel provides customers its own vertical services.

Nor does Z-Tel merely resell incumbents' local voice service. As discussed *supra* at 3-4, the unbundled elements of the local network that competitors buy from incumbents are not finished "services," but are simply raw capacity on wires and equipment. To provide local voice services, Z-Tel and other competitive carriers must take that capacity and add all of the "service" components, including account management, billing and collections, and coordination of interconnection with other carriers. By performing these functions more effectively and efficiently than the incumbents, and by combining them with incumbents' essential facilities, competitors can offer improved retail local services that benefit consumers by driving down prices and improving the end-user experience.

In any event, whether competitors such as Z-Tel can be categorized as "resellers," as Verizon contends and the

government implies, depends on the definition of the relevant input and retail product markets. Questions of market definition, however, are intensely factual and ill-suited for resolution at the pleading stage. *See Kodak*, 504 U.S. at 482 (reversing summary judgment and noting that "[t]he proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers") (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)).[14] Accordingly, even if Verizon's and the government's assumption that competitors are merely resellers were accurate (which it is not), those litigants' arguments fail because they rely on a disputed factual issue that cannot be resolved at this stage of the litigation.

II. SECTION 2 AND THIS COURT'S PRECEDENTS IMPOSE AN AFFIRMATIVE DUTY TO DEAL ON THE OWNER OF ESSENTIAL FACILITIES THAT CANNOT REASONABLY OR PRACTICALLY BE DUPLICATED.

A. Retail Competition Will Not Arise Without Antitrust Intervention When A Monopolist Owns Essential Facilities That Competitors Need To Provide Retail Services.

Section 2 of the Sherman Act was "enacted for the protection of competition, not competitors," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The Sherman Act does not broadly "prohibit or condemn 'monopoly in the concrete,'" SG Br. 10 (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911)); a general governmental prescription of monopoly is unnecessary

[14] Moreover, even if competitors ultimately *were* proved to be mere resellers, they would still be entitled to rely on an incumbent's evasions of its regulatory obligation *for the purpose of maintaining its monopoly* to show a violation of Section 2. *See infra* at 28-29.

because, in markets free from exclusionary and predatory conduct, competition usually will develop without intervenetion. That competition will, in turn, tend to break down monopolies.[15]

In circumstances involving a monopolist's control of essential facilities, however, antitrust law intervenes to protect the competitive process because competition will not otherwise arise. As this Court has held, it is "unreasonable, *per se*, to foreclose competitors from any substantial market." *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). "The antitrust laws are as much violated by the prevention of competition as by its destruction." *See United States v. Griffith*, 334 U.S. 100, 107 (1948); *see also Kodak*, 504 U.S. at 482-83 (Section 2 forbids the use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor.") (quoting *Griffith*, 334 U.S. at 107). Section 2 is thus intended not to eliminate isolated bad acts, but to protect the competitive process so that competition may emerge.

This Court already has acknowledged—in the context of the gas and electric industries—that competition will not develop naturally when a monopolist owns an essential facility that cannot reasonably or practically be duplicated by competitors:

> Companies supplying manufactured gas proliferated in the latter half of the 19th century and, after initial efforts at regulation by statute at the state level proved unwieldy, the States generally left any regulation of the industry to local governments. Many of those municipalities honored the tenets of laissez-faire to the

[15] *See, e.g.*, J. Soma, D. Forkner, and B. Jumps, *The Essential Facilities Doctrine in the Deregulated Telecommunications Industry*, 13 Berkeley Tech. L.J. 565, 581 (1998) ("Congress enacted the antitrust laws to promote economic efficiency via the protection of the competitive process.").

> point of permitting multiple gas franchisees to serve a single area and relying on competition to protect the public interest. The results were both predictable and disastrous, including an initial period of "wasteful competition," followed by massive consolidation and the threat of monopolistic pricing.

General Motors Corp. v. Tracy, 519 U.S. 278, 288-89 (1997) (internal citations omitted). The evolution of the electrical industry followed a similar course:

> Again, after an initial period of unsuccessful regulation by state statute, States mostly left regulation of the electric industry to municipal or local government. Multiple franchises were handed out, and duplicative utility systems came into being. The results were ruinous and short-lived. For example, 45 mostly overlapping franchises were granted for electric utility operation in Chicago between 1882 and 1905. By 1905, however, a single monopoly entity had emerged from the chaos, and customers ended up paying monopoly prices.

Id. at 290 n.7 (internal citations omitted). The *GMC* Court concluded that, where bottleneck distribution facilities exist, the states had learned "from chastening experience" that competition could not be relied upon to eliminate monopolies, but would "simply give over to monopoly in due course." *Id.* at 290.

The same is true in the context of the local telephone network, where the local transmission bottleneck closely resembles those of the gas and electric industries. As the Seventh Circuit wrote in *MCI v. AT&T*, it simply "would not be economically feasible for [a competitor] to duplicate [the incumbents'] local distribution facilities (involving millions of miles of cable and line to individual homes and businesses)." 708 F.2d 1081, 1133 (7th Cir. 1983). In such circumstances, competition will not develop to break up the monopoly and the antitrust laws should "impose[] on firms

> controlling [the essential transmis-sion facilities] the obligation to make the facilit[ies] available on non-discriminatory terms." *Id.* at 1132.

In all of these industries—gas, electric, and telecommunications—competition is entirely possible in the *retail* products[16]: it is the bottleneck nature of the *transmission facilities* that prevents the development of competition in the retail markets. As this Court has recognized, imposing a duty to deal under Section 2 to provide access to those transmission facilities is necessary to enable retail competition to develop. Consequently, the government's argument that Section 2 never imposes an affirmative duty to deal on a monopolist whose actions "make business or economic sense" is simply incorrect. SG Br. 7.

B. This Court Has Recognized That A Monopolist's Refusal To Provide Reasonable Access To Essential Facilities Violates Section 2.

This Court's decision in *Otter Tail*, which involved transmission facilities for electric power, recognized that antitrust intervention is necessary to enable competition to arise when a transmission bottleneck exists. *Otter Tail* addressed the refusal of an electric utility either (1) to allow municipalities seeking to sell electricity at retail to use the utility's regional transmission facilities to transmit power purchased from another provider, or (2) to sell its own power at wholesale to such municipalities. The Court focused on

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[16] *See, e.g.*, http://www.platts.com/features/usgasguide/retail.shtml (13 states have retail competition in the gas industry); http://www.eia.doe.gov/cneaf/electricity/chg_str/booklet/progress.html (as of 1999, 24 states had passed statutes to enable retail competition in the electric industry). The Telecommunications Act of 1996 was motivated in substantial part by the realization that retail competition for telecommunications services, including local and vertical services, is entirely possible if access to essential transmission facilities is available on reasonable terms.

the bottleneck nature of Otter Tail's transmission facilities; it noted the district court's determination that Otter Tail "ha[d] 'a strategic dominance in the transmission of power in most of its service area,' and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." 410 U.S. at 377. The Court concluded that Otter Tail's refusal to deal with the towns to supply access to its transmission facilities "sought to substitute for competition anticompetitive uses of its domin-ant economic power." *Id.* at 380. The Court therefore upheld the district court's order enjoining Otter Tail from refusing to deal. *Otter Tail* thus recognized that Section 2's protection of the competitive process requires an affirmative duty to deal in connection with essential facilities.

Although the dissent in *Otter Tail* questioned the need for applying Section 2 in that context,[17] its analysis makes clear that this case is far easier. Justice Stewart argued that monopoly was inevitable in retail distribution of electricity, and that "the inevitability of a monopoly . . . requires price control to take the place of competition." 410 at 389. As a result, he believed, "antitrust principles applicable to other industries cannot be blindly applied" to the electric industry. *Id.* In other words, in *Otter Tail* the utility tried to use its dominance over transmission to foreclose entrants into the retail market—but the dissenters believed that the retail product was *inevitably* a price-regulated monopoly, so there was nothing to be gained by traditional application of the antitrust laws. As noted above, however, it is now widely accepted that retail competition is entirely possible in the context of bottleneck transmission facilities if reasonable access to essential facility *inputs* into the finished retail services is assured. *See supra* at 15 & n.16. Thus, *Otter*

[17] Justice Stewart's opinion, joined by Chief Justice Burger and then-Justice Rehnquist, actually concurred in a part of the majority opinion not relevant here, but otherwise dissented.

Tail's holding—preventing the utility from withholding the essential transmission input into retail electrical service—is particularly relevant to modern retail competition.

C. *Otter Tail* Squarely Applies To The Essential Transmission Facilities That Competitive Companies Need To Provide Local and Vertical Telecommunications Services.

Otter Tail's recognition that Section 2 imposes an affirmative duty to deal on owners of essential transmission facilities applies to this case. The parallel is obvious in connection with competitors' provision of vertical services. In *Otter Tail*, towns wished to use the utility's essential transmission facilities to transmit electricity from outside sources to retail end-users. Similarly, competitors like Z-Tel wish to use the incumbents' essential transmission facilities to transmit vertical services from outside sources (such as Z-Tel's computers in Tampa) to retail end users.

The same parallel applies to competitors' provision of local voice services. Contrary to the arguments of the government and Verizon, the incumbents' local transmission facilities are *not* identical to the retail local voice services provided to end users any more than the utility's transmission facilities were identical to the retail electric service in *Otter Tail*. In both cases, the essential network facilities to which competitors seek access represent merely raw transmission capacity. To provide a retail service, competitors like Z-Tel add customer service, account management, billing and collections (including the complex yet vital activities of charging other carriers for sending and receiving calls and paying still other carriers to send or receive calls), and other components. Competitors need the incumbents' essential transmission facilities merely as an *input* into finished local voice services provided to end users.

D. The Essential Facilities Doctrine Provides A Sound Basis For Identifying When Monopolists Must Deal With Competitors.

The essential facilities doctrine, recognized by every federal court of appeals,[18] reflects the fundamental principle of *Otter Tail*: when a company controls essential facilities that competitors need to deliver their retail services to consumers, the Sherman Act imposes an affirmative duty to provide access to the facilities on reasonable terms. Properly applied, the doctrine provides a sound basis for identifying when monopolists should be required to share their facilities. Specifically, the doctrine imposes a duty to deal only when four elements are present: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI*, 708 F.2d at 1132-33.

The second prong is critical: the doctrine requires only owners of bottleneck facilities that cannot reasonably or practically be duplicated—in the *Verizon* Court's terms, facilities the "duplication of which is neither likely nor desired," 535 U.S. at 515—to deal with competitors on reasonable terms to allow the use of those facilities. Significantly, even critics of the essential facilities doctrine acknowledge that local telephone transmission networks satisfy this narrow notion of "essentiality." Areeda and Hovenkamp's antitrust treatise, for example, cites the "natural monopolies of the local telephone exchanges in the *MCI* and *Southern Pacific* cases" as the clearest example of truly "essential" facilities, noting that "[o]ne could not sell residential and most business long distance service without access to the hardwired local statutory monopolies controlled

[18] For a list of relevant cases, *see* Brief in Opposition to Petition for Certiorari of the Law Offices of Curtis Trinko, L.L.P., at 22.

by the defendant." Areeda & Hovenkamp, 3A *Antitrust Law* 199 (citing *MCI*, 708 F.2d at 1132, and *Southern Pacific Communications v. AT&T*, 740 F.2d 980 (D.C. Cir. 1984)). As discussed above, the same is true of local voice and vertical services.

E. Adopting The Government's Test For "Exclusionary" or "Predatory" Conduct Would Eliminate The Essential Facilities Doctrine.

The government correctly concedes that the essential facilities doctrine fits within the framework of the Sherman Act. At the same time, however, the government argues that liability should be found only when a monopolist's "refusal to sell his goods or services below the monopoly price" is "exclusionary" or "predatory"—*i.e.*, when the refusal to sell makes no business sense. *See* SG Brief at 21-22. The government's concession is illusory; its proposed standard would eviscerate the essential facilities doctrine.

The government incorrectly implies that Z-Tel and other competitive carriers are mere resellers by confusing the market for a finished retail service (local voice and vertical services) with the market for the essential transmission facilities (loops, local transport, switching, and signaling) used as inputs in the provision of the retail service. In arguing that the incumbents should be allowed to "refus[e] to sell [their] goods or services below the monopoly price," SG Br. at 23, the government fails to recognize that the "goods" at issue here are merely *inputs* into the finished service. As a business matter, there is no price at which a monopolist will sell essential inputs to rivals such that it will suffer a reduction of its market power; indeed, the theoretical economic price of an input that cannot reasonably or practically be duplicated is infinitely high. The monopolist will simply refuse to deal or, equivalently, deal only on terms

that make potential competitors unprofitable.[19] Under this Court's ruling in *Otter Tail*—and the essential facilities doctrine reflecting that ruling—a monopolist *cannot* be allowed to refuse to deal in connection with essential transmission facilities, because that would eliminate the possibility of competition in the retail market for the finished product. In short, although the government pays lip service to the essential facilities doctrine in some circumstances, the logic of its argument leaves no room for the doctrine's application.

F. This Court Already Has Rejected The Government's Argument That A Desire To Maintain Retail Profits Justifies A Monopolist's Refusal To Deal In Connection With Essential Facilities.

The government also suggests that a monopolist's desire to sell at retail rather than at wholesale justifies a refusal to provide reasonable wholesale access to essential facilities. *See, e.g.*, SG Br. 29 (stating that the complaint should be dismissed because incumbents cannot be obliged by Section 2 to "act[] as wholesalers"). This Court has rejected that argument repeatedly. First, in *Otter Tail*, the utility urged that it had a "business justification" for refusing to wheel power or to sell at wholesale. Otter Tail claimed that if it were to do so, "more and more municipalities" would go into the distribution business, and Otter Tail would lose retail customers and "go downhill." 410 U.S. at 380.[20] The Court

[19] An offer to deal at an unreasonable price is, of course, tantamount to a refusal to deal. *See, e.g., Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990) ("[T]here need not be an outright refusal to deal in order to find the denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable.").

[20] The dissent regretted that the Court "scoff[ed]" at this "business justification" defense. Justice Stewart argued that "where the health of

responded brusquely, stating that "[t]he promotion of self-interest alone" does not insulate efforts to preserve a monopoly from liability under Section 2: "Th[e] Act assumes that an enterprise will protect itself against loss [of retail customers] by operating with superior service, lower costs, and improved efficiency," not by "substitut[ing] for competition anticompetitive uses of its dominant economic power." *Id.* Accordingly, the incumbents have the option of maintaining retail customers by out-competing new entrants through the development of better and cheaper retail services; but Section 2 does not permit the incumbents to substitute the use of their dominance over local transmission facilities for competition in retail services.

Second, *Eastman Kodak v. Image Technical Services* also directly rebuts the government's suggestion that efforts to maintain retail customers by unreasonably refusing to sell at wholesale are exempt from Section 2's prohibitions.[21] The *Kodak* plaintiffs ("independent service organizations" or "ISOs") alleged that the company's refusal to sell them parts used in the repair of Kodak copiers represented

power companies and the abundance of our energy supply were considerations central to the congressional purpose in devising the regulatory scheme," protecting Otter Tail's economic health was an appropriate consideration. *Id.* at 389. In the present context, however, there can be no claim that Congress has sought to protect the economic health of the incumbents at the expense of competition; to the contrary, this Court's recent decision in *Verizon* emphasized that Congress wished to "give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." 535 U.S. at 489.

[21] *Kodak* involved "monopoly leveraging," although the Court employed traditional Section 2 analysis. *See* 504 U.S. at 479 n.29 (rejecting the dissent's view that the antitrust laws "do not apply" to efforts to extend an "inherent" monopoly into other markets). *Kodak*'s "monopoly leveraging" holding is discussed below in the portion of our brief addressing that issue. *See infra* at 23-26.

monopolization or attempted monopolization of the copier service market (because repairs could not be made without parts). Kodak's policy was motivated by a desire to retain the lucrative service component of its copier clients' retail business, rather than selling its parts at wholesale and risking the deterioration of its retail business. This Court found that the plaintiffs' had presented evidence of a Section 2 violation because Kodak had "used its control over parts to strengthen its monopoly share of the Kodak service market," so "[l]iability turn[ed] . . . on whether 'valid business reasons' can explain Kodak's actions." *Id.* at 483.

Kodak declined to make the brazen argument presented by the government in this case—that the company's desire to maintain its *retail* (service) monopoly rather than selling parts at *wholesale* constituted a "valid business reason." Realizing that a company's bare desire to maintain supra-competitive profits cannot be a valid business justification under Section 2, Kodak instead made the similar argument that its refusal to sell parts to ISOs was justified to prevent them from "free-riding on Kodak's capital investment." *Id.* According to Kodak, the ISOs were "free-riding" because "they ha[d] failed to enter the equipment and parts markets." *Id.* at 485. This Court rejected that claim, however, because "[t]his understanding of free-riding has no support in our case law." *Id.* Rather, "one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously." *Id.*

G. Verizon's Argument That The Essential Facilities Doctrine Applies Only To Monopolists That Have Voluntarily Dealt With Competitors In The Past Is Incorrect.

Verizon argues that there is "no prima facie reason to question a refusal of never-before-offered terms" and that doing so here would require every monopolist to "dismantle its retail monopoly." Verizon Br. 19. Clearly, however, the

essential facilities doctrine would not require the "dismantling" of retail monopolies maintained due to legitimate efficiencies—the doctrine would apply only to monopolies resulting purely from ownership of essential facilities.[22] Moreover, a monopolist should not be permitted to refuse to deal simply because it consistently refused to deal with competitors in the past, as opposed to terminating existing deals. Although making an "important change" such as terminating existing relations may have evidentiary significance in some contexts, this Court has held that "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting R. Bork, *The Antitrust Paradox* 138 (1978)). Excluding rivals by consistently refusing to lease bottleneck facilities in all circumstances is certainly no less predatory than refusing to deal only some circumstances.

III. THE GOVERNMENT'S ARGUMENTS AGAINST APPLYING A "MONOPOLY LEVERAGING" THEORY IN THIS CASE ARE MISPLACED.

The circuit court found that petitioner may be able to prove a "monopoly leveraging" claim, which, under Second Circuit law, would require showing that respondent "(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market; and (3) caused injury by such anticompetitive conduct." Pet. App. 30a (quoting *Virgin Atlantic Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001)). The government rejects this "gain-a-competitive-advantage" formulation of the monopoly

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[22] In this case, the incumbents' monopoly not only derives from control of essential facilities, but from essential facilities 1) that they own as the result of a state-granted monopoly over local services; and 2) that were entirely funded (including a profit for the monopolist) by the ratepayers.

leveraging theory, claiming that the Sherman Act "proscribes [only] monopolization or attempted monopolization, rather than [mere] 'misuse' of market power." SG Br. 26. The government also maintains that "[s]uch a theory is incompatible with the antitrust laws" because it potentially could extend antitrust liability to "monopolists that gain *any* competitive advantage," including from "economies of scope or scale, or the ability to sustain expensive research and development efforts." SG Br. 27 (emphasis added). Both of those concerns are misplaced in the present context.

First, although the government cites Areeda and Hovenkamp in rejecting the Second Circuit's application of the monopoly leveraging theory, it fails to acknowledge these scholars' view that it "requires no extension of Sherman Act §2's basic coverage" to find liability where "the defendant has used or is using its monopoly power in one market to create a monopoly in a second market—for example, when it forces customers of its *A* monopoly to purchase its *B* good rather than the good of any rival." Areeda & Hovenkamp, 3 *Antitrust Law* 95. Z-Tel and other competitors face this problem: the incumbents seek to expand their dominance in local voice services (*A*) into vertical services (*B*). As a consequence of decades of franchised monopoly and the incumbents' control of access to the AIN platform, *see supra* at 2 and n.2, vertical services are nearly always supplied by a customer's local service provider. Incumbents clearly retain dominance in local voice services, and therefore have (at the very least) a "dangerous probability" of attaining a monopoly in vertical services. Accordingly, the Court does not need to address the government's quibble with the Second Circuit's formulation of the "monopoly leveraging" theory in the context of leveraging claims against incumbent telephone companies. Such claims fall within the traditional scope of Section 2.

This Court's decision in *Kodak* confirms that conclusion. *Kodak* was a traditional Section 2 case involving allegations that Kodak had monopolized or attempted to monopolize the service market by refusing to sell parts to ISOs—in other words, Kodak was attempting to leverage its *A* market in parts into the *B* market for service. After finding that Kodak had monopoly power in the relevant market, thus satisfying the first element of a Section 2 claim, this Court held that the second element of a § 2 claim is met when a monopolist uses its "monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" 504 U.S. at 482. At the summary judgment stage, the Court found that respondents' evidence that Kodak had "used its control over parts to strengthen its monopoly share of the Kodak service market" satisfied that requirement. *Id.* at 483.[23] In short, *Kodak* represents a finding by this Court that efforts by a company with a lawful monopoly to leverage that monopoly into dominance in another market are subject to scrutiny under Section 2.

The government's second concern—that a broad doctrine of "monopoly leveraging" might improperly extend antitrust liability to monopolists attempting to leverage "any competitive advantage," SG Br. 27, however benign—is simply inapposite here. Even critics of monopoly leveraging in other contexts acknowledge that "monopoly leveraging has rightly been a concern where natural monopoly prevails, principally because the monopolists have been rate-regulated."[24] Because the purpose of such rate regulation is to prevent the monopolist from collecting monopoly rents in

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[23] As set forth *supra* at 21-22, the Court also rejected Kodak's argument that its refusal to deal with ISOs was justified by its desire to maintain the retail services component of its customers' business.

[24] *See, e.g.*, J. Speta, *Tying, Essential Facilities, and Network Externalities: A Comment on Piraino*, 93 NW U. L. Rev. 1277, 1280 (1999).

the regulated market, such entities have a strong incentive to attempt to extend their dominance in the regulated industry into related, *unregulated* markets where they will be able to charge supra-competitive prices.[25]

Z-Tel and other competitors face precisely this problem in the telecommunications context. Because the incumbents' local voice services are rate-regulated, they wish to leverage their local dominance into unregulated vertical services. Consistent with *Kodak* (and the views of Areeda and Hovenkamp)—and contrary to the positions taken by the government and respondent—such leveraging represents a garden-variety violation of Section 2.

IV. LIABILITY UNDER SECTION 2 IS FULLY CONSISTENT WITH THE TELECOMMUNICATIONS ACT OF 1996.

In addition to arguing that the conduct alleged in this case does not implicate Section 2, Verizon also makes the curious claim—not joined by the government—that the 1996 Act renders enforcement of the antitrust laws "inadvisable" here, even if they are applicable. Verizon Br. 34-40. The 1996 Act imposes certain obligations on incumbent local exchange carriers to lease elements of their local bottleneck facilities to competitors, independent of (but consistent with) their obligations under the antitrust laws. *See, e.g.*, 47 U.S.C. § 251(c). But, as the government acknowledges

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[25] As Justice O'Connor explained in the similar context of tying allegations:

> In a regulated industry a firm with market power may be unable to extract a monopoly profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 n.4 (1984).

> the 1996 Act does not by its terms bar application of the Sherman Act to the same sphere of conduct or provide immunity from Section 2 prosecutions. To the contrary, the 1996 Act includes a savings clause that recognizes that the antitrust laws impose distinct obligations and that neither set of laws displaces the other. Specifically, the 1996 Act provides . . . that it should not "be construed to modify, impair, or supersede the applicability of any of the antitrust laws."

SG Br. 10-11 (citing 47 U.S.C. § 152 note).

In light of the 1996 Act's savings clause, Verizon is left to argue vaguely that applying the antitrust laws in the presence of the 1996 Act would somehow threaten the functioning of the regulatory regime. But that is not the case—Congress presumably went to the trouble of expressly preserving antitrust law in the 1996 Act precisely because it *reinforces* the pro-competitive purposes of the Act.[26]

Although the government does not join in Verizon's strained immunity argument, it advances an unmeritorious argument premised on the 1996 Act that would have the same effect. The government criticizes the lower court for "appear[ing] to have assumed" that "reasonable access"

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[26] Moreover, as the court below noted, there is nothing novel about applying the antitrust laws in the context of a pro-competitive regulatory statute:

> In [*Otter Tail*], the Supreme Court held that the antitrust laws apply to at least one other industry regulated by a statute that was intended to encourage competition in the industry . . . . The Court noted that the Act embodied "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest" . . . . And despite a specific regulatory structure that was [like the 1996 Act] meant to encourage competition through interconnection, the Court found that the Federal Power Act did not preclude an antitrust suit against the regulated utility.

Pet. App. 34a-35a.

means "on the terms provided under the 1996 Telecommunications Act rather than on such terms as would make business sense" for the monopolist. According to the government, that "inappropriately imports Telecommunications Act duties and standards into the antitrust laws." SG Br. 24. By claiming that incumbents are always justified in refusing to sell essential inputs for less than the monopoly price of a finished retail service, however, the government erroneously "assumes" that violations of the 1996 Act can *never* create liability under the antitrust laws. That assumption appears to render the antitrust savings clause surplusage; in any event, it is plainly contrary to the clause's terms.[27]

The government also fails meaningfully to address the established principle that a breach of an "extrinsic statutory or legal duty" may support a monopolization claim.[28] The

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[27] It is also contrary to the legislative history of the statute. *See. e.g.*, President's Statement upon Signing, S. 652, 32 Weekly Comp. Pres. Doc. 218 (Feb. 8, 1996) ("This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully.") Notably, the FCC does not appear to read the antitrust savings clause like the government. In granting Verizon's petition for authorization to provide long-distance service in New York, the FCC stated: "Furthermore, Bell Atlantic [Verizon's predecessor] risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner." *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4165 (1999). The FCC was right: by providing discriminatory access to their facilities, incumbents may be liable under the antitrust laws as well as other laws, including the 1996 Act.

[28] *See* ABA Section on Antitrust, *Antitrust Law Developments* 249 (5th ed. 2002) ("Where conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find such conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws.").

government expressly acknowledges the line of cases so holding, and concedes that evidence of "fraud and deception," "enforcement of a fraudulently obtained patent," or "sham litigation or bad-faith contact with administrative agencies" may all form the basis of a monopolization claim. *See* SG Br. 12 n.3; 14 n.4; 25 n.10. Nevertheless, it simply announces its view that violations of the 1996 Act are different.

The government's bald assertion is wrong. Once again, *Otter Tail* provides a close analogy to this case. This Court repeatedly noted that Otter Tail had refused to interconnect with requesting municipalities for the purpose of wheeling power, notwithstanding the Federal Power Commission's requirement that it do so. *Otter Tail*, 410 U.S. at 371-72, 376-77, 380 n.10. That violation of an extrinsic duty, far from insulating Otter Tail from antitrust liability, clearly contributed to this Court's holding that Otter Tail had violated Section 2.[29]

In its brief, the government also confuses the issue of liability with remedy. As to *remedy*, as the government acknowledges, this Court's decision in *Terminal Railroad* calls for "equal access on reasonable terms." SG Br. 24 n.9 (quoting *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912)). That is precisely what cost-based rates established by regulators under the 1996 Act accomplish—as the Antitrust Division advised the FCC when it urged the FCC to adopt the pricing rules upheld by this Court in *Verizon*.[30] That acknowledgement makes the government's

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[29] Moreover, by suggesting that incumbents may decide whether allowing access "would make business sense," SG Brief at 24, without regard to the legal regime under which the business operates, the government implicitly endorses the view that it may make "business sense" to violate the law, thereby securing immunity from antitrust scrutiny.

[30] *See* Comments of the United States Department of Justice, CC Docket 96-98 (May 16, 1996), at 31. The FCC followed the Division's

apparent belief that a monopolist cannot be *liable* under the antitrust laws if the *remedy* would require the monopolist to charge less than monopoly rates all the more inexplicable.

Finally, the existence of a regulatory scheme to establish wholesale prices for bottleneck telecommunications facilities actually *removes* a practical issue flowing from the application of the essential facilities and monopoly leveraging theories. On account of that regulatory regime, courts finding liability will not have to wrestle at the remedial phase of an antitrust case involving bottleneck local telephone facilities with the vexatious issue of determining "reasonable terms." That has already been done by expert regulators. Thus, the existence of a regulatory scheme that explicitly does not modify, impair, or supersede the antitrust laws not only presents no barrier to the application of Section 2, but actually renders application of Section 2 more straightforward as a practical matter.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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advice. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*First Report and Order*"), 15821 (summarizing the Antitrust Division's views), 15846-47 (adopting a methodology designed to establish prices for network elements "based on costs similar to those incurred by the incumbents").

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No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, L.L.P.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred in reversing the district court's dismissal of respondent's antitrust claims.

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

NASUCA is a non-profit national association organized in 1979, comprising 42 offices of utility ratepayer advocates in 40 states and the District of Columbia who operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

NASUCA's members represent millions of American consumers served by public utilities in state and federal regulatory proceedings, in testifying before Congress and federal regulatory agencies, and in appearing before state and federal courts on matters concerning rates and service quality. In addition to furthering members' roles as utility consumers' advocates, NASUCA is charged with exchanging ideas, improving consumer representation in federal and state government, and educating and encouraging greater participation by consumers in the regulatory process. NASUCA is active before the Federal Communications Commission ("FCC") in proceedings implementing the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 151 *et seq.* ("1996 Act" or "the Act"). In addition, NASUCA is represented on the Federal-State Joint Board on Universal Service and other FCC advisory bodies concerned with the Act's implementation.

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[1] The parties to this action filed with the Clerk of the Court a blanket consent to the filing of *amicus* briefs. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no persons other than the National Association of State Utility Consumer Advocates ("NASUCA") have made a monetary contribution for the preparation or submission of this brief.

The history of the consumer movement demonstrates that vigorous competition is an effective tool for achieving the best quality and lowest price of goods and services. NASUCA has long recognized the critical role antitrust laws play in advancing competition and consumer choice in telecommunications, including the divestiture of the Bell system that brought consumer choice to the long distance market. In order to advance the nation's economic policy to benefit consumers by favoring competition over monopoly power, the private treble damages provision of the antitrust laws was enacted both to compensate individuals and to enforce that economic policy.

On behalf of utility consumers, NASUCA was active in the legislative process that led to enactment of the 1996 Act. As stated in its Preamble, the Act's overriding purpose is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the deployment of new telecommunications technologies." Accordingly, competition is a tool utilized to serve the Act's pro-consumer objective; competition is not merely intended to vindicate the telecommunications carriers' corporate interests. The 1996 Act represents this Nation's commitment to transition from a monopoly local service market to one that is robustly competitive, for the ultimate benefit of all telecommunications consumers nationwide.

Since enactment of the 1996 Act, competition in the local exchange telecommunications market, especially for the residential consumers represented by NASUCA, has advanced at an agonizingly slow pace. Most consumers still spend more each month on local service than on long distance and other telecommunications services. For many consumers there is still no choice of local service provider other than the incumbent. Consumers have a substantial economic stake in ensuring access to the network that is at the heart of the

statutorily mandated interconnection process set forth in the 1996 Act. Inseparable from that stake is consumer standing to assert antitrust claims to redress telecommunications carriers' anticompetitive conduct in the new marketplace, which may as a separate matter violate the Act designed to provide consumers with wider choice, lower costs, and higher quality service.

SUMMARY OF ARGUMENT

At the outset, NASUCA wishes to make clear that its *amicus* brief primarily discusses the policy grounds for recognizing the continued need for, and efficacy of, private rights of action under the antitrust laws to remedy monopolistic conduct in the newly competitive local market. Of greatest emphasis is the issue whether the Act expressly or impliedly provides petitioner with immunity from liability under federal antitrust laws for acts that may also involve or violate the duties and obligations of carriers under the 1996 Act. NASUCA believes that no immunity from antitrust law is conferred upon the petitioner by the Act, either expressly or impliedly. Further, NASUCA believes that conferring such immunity upon incumbent local exchange carriers ("incumbent LECs" or "ILECs") would defeat the pro-consumer goals of both the 1996 Act and the federal antitrust laws. NASUCA does not address the finer points of federal antitrust law here, nor does NASUCA address the issue whether the respondent adequately pleaded the necessary elements of a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, in its amended complaint in the District Court. Those issues are ably discussed at length in respondent's brief and other *amici* briefs in support of respondent.

This Court has previously recognized both the bottleneck nature of the telephone network as a formidable barrier to competition in the local exchange market, and the crucial role access to the network plays in overcoming that problem. Access to the network is essential if consumers are to have a

choice of local providers in the markets fostered by the 1996 Act. The benefits of the interconnection process are intended to flow to consumers, with greater choice, lower prices and improved quality of service. In order to protect that interest, consumers must have standing to use the antitrust laws, including the right to seek treble damages, when incumbent LECs' monopolistic practices frustrate the provision of reliable service, as alleged by respondent Trinko in the case below. Recognizing that consumers may bring actions under existing antitrust laws is also necessary to give meaning and effect to the 1996 Act's savings clause, which made it clear that the Act's elaborate regulatory scheme is not intended to preclude any claims viable under the antitrust laws.

The consumer interest and the need for consumer redress are distinct from those of potential entrants and competitors, with no danger here of duplication of recovery. The fines imposed by regulators for violations of the 1996 Act are awarded either to competitors or the government. Those fines are inadequate to protect consumers; indeed, without a consumer remedy, an antitrust violator may find violating the antitrust laws to be economically efficient. Furthermore, no regulator charged with implementing the 1996 Act has authority to impose treble damages or injunctive relief to protect consumers against monopolistic violations of the Act's regulatory scheme, even when such violation deprives consumers of choice, lower prices or better quality of service.

The millions of consumers that NASUCA represents are adversely affected when anticompetitive conduct by incumbent monopolies breaches their obligations under the Act, regardless of what, if any action is taken by new or prospective entrants in response. Specifically, a violation of the 1996 Act's mandated interconnection process harms consumers if, as a result of the violation, the competitor charges consumers more for local telephone service or, as alleged by respondent, provides lower quality service.

Alternatively, if as a result of the incumbent's conduct, existing competitors exit the local market or prospective competitors decide not to enter the market, all consumers in that market are deprived of a competitive choice for local service. If the competitor is deterred from vigorously contesting the anticompetitive behavior only as it affects its largest volume customers, then residential consumers with lower volume usage are deprived of a competitive choice for local telephone service in that market.

In the circumstances of this case, respondent—and consumers generally—have standing to assert an antitrust claim for anticompetitive conduct by an incumbent LEC that harms consumers by frustrating competition, increasing price, reducing quality, or consumer choice. The ruling of the United States Court of Appeals for the Second Circuit should be affirmed as advancing, not undermining, the Congressional objectives of the antitrust laws and 1996 Act; those laws are intended to be and do serve as complements of each other in protecting the consumer interest.

I. THE TELECOMMUNICATIONS ACT OF 1996 DOES NOT CONFER IMMUNITY FROM LIABILITY UNDER FEDERAL ANTITRUST LAWS

A. The Telecommunications Act of 1996 Expressly Preserves Private Antitrust Actions.

The 1996 Act radically altered the regulatory regime previously applicable to local telecommunications service. In the Act, Congress mandated that competition in the local telecommunications market should be fostered and imposed a range of duties on incumbent LECs—regulated monopolies—intended to facilitate competitors' entry into those markets for the benefit of consumers. The statutory *quid pro quo* for compelling the incumbent LECs to open their networks and markets to competition, of course, was the promise that once

they fully opened their networks, the incumbent Bell operating companies could themselves enter the interLATA long distance telecommunications market, something from which they had been barred since the breakup of AT&T in 1984. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 491-94 (2002) and *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999).

Sections 251 and 252 of the 1996 Act—together with the antitrust laws—are the cornerstones of Congress' program for fostering competition in the local telecommunications market. Section 251(b) establishes the general duty of all local telecommunications carriers to interconnect with one another's facilities and equipment. Section 251 (c) requires incumbent LECs to negotiate, in good faith, agreements with competitors that fulfill their Section 251 (b) duties by, among other things: providing interconnection to requesting carriers (*i.e.*, new entrants); providing access to unbundled network elements; providing wholesale discounts for retail services that new entrants wish to resell; and giving reasonable public notice of changes in their services that would affect others. 47 U.S.C. §§ 251(b) & (c); *see Verizon Communications,* 535 U.S. at 491-92. Section 252 provides for the negotiation, arbitration and review of those agreements between new entrants and incumbents. State regulatory commissions, the Federal Communications Commission ("FCC") and the courts all have roles to play in reviewing, approving and enforcing these interconnection agreements. *See, e.g.*, 47 U.S.C. §§ 252(b)(l)(4), (c) & (e)(1), (5) & (6).

The primary purpose of 1996 Act's mechanisms in Sections 251 and 252 is to benefit consumers, not telecommunications carriers, by opening the local telecommunications market to competition. This pro-consumer goal of the 1996 Act is expressed in its Preamble: "*To promote competition . . . in order to secure lower prices and higher quality services for American telecommunications consumers*

and encourage the rapid deployment of new telecommunications technologies." (emphasis supplied) Congress made clear its preference for competition, noting that "U.S. telecommunications policy [had for decades] relied on heavily regulated monopolies to provide telecommunications to businesses and consumers." H. Rep. 104-204, 104th Cong., 2d Sess. 48, *reprinted in* 1996 U.S.C.C.A.N. 11. Congress believed that "[t]echnological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies." *Id*

Although the 1996 Act is clearly intended to benefit consumers by opening the local telecommunications monopoly to competition, the Act does not include any specific new mechanisms for consumers to protect and advance their interests in a competitive market *vis a vis* the incumbent, local monopolies. However, the 1996 Act contained several provisions that made it clear that consumers' rights under antitrust laws were not preempted or superseded as a result of the regulatory regime designed by Congress to foster competition in the local market.

In Section 601(b) of the 1996 Act, Congress retained the general savings clause contained in Section 152 of the Act, which states that "nothing in this Act or in the amendments made by the Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Telecommunications Act of 1996, Pub. L. No. 104-104 § 601(b)(1), 110 Stat. 56, 143 (1996), *codified at* 47 U.S.C. § 152 note. On its face, this clause compels the conclusion that consumers retain all their preexisting rights to bring private antitrust actions against carriers engaged in unlawful, monopolistic practices. But to make it even clearer that private antitrust rights were retained, and not restricted or eliminated, Congress included a second savings clause in Section 601(c) of the Act, under the heading "Federal, State,

and Local Law," which provides: "No Implied Effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." *Id.* § 601(c)(1). The Act's savings clause is "plain on its face and must guide our analysis." *Law Offices v. Bell Atlantic Corp.*, 305 F.3d 89, 109 (2nd Cir. 2002).[2]

The plain language of the 1996 Act compels the conclusion that private antitrust rights are preserved and retained. The 1996 Act's legislative history makes this point clearer still, because Congress emphasized that incumbent LECs, like the petitioner here, remain subject to federal antitrust law.[3] The

[2] If Congress had intended to limit or abrogate consumers' private rights of action under existing antitrust laws in the 1996 Act, it would have done so. Congress did just that in connection with at least one provision of the 1996 Act. Section 255 of the 1996 Act imposes obligations on telecommunications carriers and equipment manufacturers to provide persons with disabilities with access to telecommunications service, 47 U.S.C. § 255. But Congress specifically eliminated any private right of action to enforce these obligations and vested the FCC with exclusive jurisdiction over any complaints arising under Section 255. 47 U.S.C. § 255(f).

[3] For example, Representative Conyers stated:

> Antitrust law is synonymous with low prices and consumer protection—and that is exactly what we need in our telecommunications industry. . . . [T]he bill contains an all-important antitrust savings clause which *ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws. . . . And by maintaining the role of the antitrust laws, the bill helps to ensure that the [Bell operating companies] cannot use their market power to impede competition and harm consumers.*

142 Cong. Rec. H1145-06 (daily ed. February 1, 1996) (emphasis supplied). *Accord*, Remarks of Sen. Thurmond, 142 Cong. Rec. S687-01 (daily ed. February 1, 1996) ("the unequivocal antitrust savings clause . . . explicitly maintains the full force of the antitrust laws in this vital industry"); *and* Remarks of Sen. Leahy, 141 Cong. Rec. S18586-01 (daily ed. December 14, 1995) ("we must rely on . . . antitrust law in

Executive Branch echoed Congress' intent that private antitrust actions remain viable, in order to complement the obligations imposed on incumbent LECs under the regulatory regime established in the Act.[4]

B. There Is No Implied Conflict Between The 1996 Act And The Respondent's Private Antitrust Claim.

Despite the plain language of the 1996 Act, its drafters' obvious intent, and the Executive Branch's understanding of both, some courts have concluded that "the more specific legislation [in the 1996 Act] must take precedence over the general antitrust laws, where the two are covering precisely the same field." *See Goldwasser v. Ameritech Corp.*, 222 F.3d

order to move as quickly as possible toward competition in all segments of the telecommunications industry [and]. . . to ensure that the free market will work to spur competition"). *See also Cavalier Telephone v. Verizon Virginia*, 330 F.3d 176, 189 (4th Cir. 2003)(citations omitted).

[4] President Clinton stated: "The Act's emphasis on competition is also reflected in its antitrust savings clause. *This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully.*" Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (February 8, 1996), *reprinted in* 1996 U.S.C.C.A.N 228-1, 228-3 (emphasis supplied). The FCC likewise recognized the continuing vitality of private rights of action under federal antitrust law. In its initial order implementing the local competition provisions of the 1996 Act, the FCC acknowledged that its regulations do not provide "the exclusive remedy" for anticompetitive conduct. "First Report and Order," *I/M/O Implementation of the Local Competition Provisions of the Tele-communications Act of 1996*, CC Docket No. 96-98, FCC 96-325 (August 8, 1996), at ¶ 124. The FCC emphasized that "'parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252," specifically including private antitrust enforcement. *Id.* at ¶ 129. On this point, the FCC was crystal clear: "[W]e clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws." *Id.*

391, 401 (7th Cir. 2000). This cannot be correct.[5] There simply is no conflict between the 1996 Act and the respondent's private antitrust claims. Rather, in order to fully protect consumers under the Act's new regulatory model and to secure the promised benefits of a competitive marketplace, the two legal regimes complement—rather than trump—one another.

The *Goldwasser* court based its dismissal of antitrust claims on the grounds that the allegations in the complaint were "inextricably linked to claims under the 1996 Act." *Goldwasser*, 222 F.3d at 401. But as the Eleventh Circuit noted, the *Goldwasser* decision relied heavily on the manner in which the specific allegations in the plaintiff's complaint were pleaded. *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1282 Fn. 8 (11th Cir. 2002). The consumers in *Goldwasser* focused their claims on the incumbent LEC's alleged violations of various sections of the 1996 Act, and included a "by the way" allegation that the incumbent's violations of the Act also constituted violations of Section 2 of the Sherman Act. *Goldwasser*, 222 F.3d at 394-95. The 1996 Act did not eliminate the requirements for pleading a federal antitrust claim and the *Goldwasser* court's dismissal may have been appropriate on purely procedural grounds.[6] But the Seventh Circuit did not stop with the

[5] Even the Seventh Circuit acknowledged problems with this formulation, writing: "Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law. Such a conclusion would be troublesome at best given the antitrust savings clause in the statute. It is that the 1996 Act imposes duties on the ILECs that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either; they are simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets . . . ." *Goldwasser*, 222 F.3d at 401.

[6] Again, however, NASUCA does not intend to address the issue whether a complaint adequately states a claim for violation of Section 2 of the Sherman Act, either in the context of this case or in *Goldwasser*.

technical insufficiency of the plaintiffs' pleadings. Instead, the *Goldwasser* court perceived a conflict between the Act and federal antitrust laws that simply finds no support in either body of law; an illusory conflict properly rejected by the Second Circuit. *Bell Atlantic*, 305 F.3d at 109; *accord BellSouth*, 299 F.3d at 1282.

There is yet another flaw in the Seventh Circuit's reasoning in *Goldwasser*. The Seventh Circuit attempted to articulate when its judicially created immunity from antitrust laws would end. The Seventh Circuit concluded that private antitrust claims would not lie against incumbent LECs for anticompetitive conduct arising out of obligations imposed under the 1996 Act until after the local telecommunications market is deemed sufficiently competitive. In defining this moment, the Seventh Circuit concluded that:

> At some appropriate point down the road, the FCC will undoubtedly find that local markets have also become sufficiently competitive that the transitional regulatory regime can be dismantled and the background antitrust laws can move to the fore. Our holding here is simply that this is not what Congress has mandated at this time for the ILEC duties that are the subject of the Goldwasser complaint.

Id. at 401-02.

The court, however, cited no legal authority for the distinction it drew between telecommunications markets to which the antitrust savings clause applies, and those markets to which it does not. Certainly nothing in the 1996 Act itself created such distinctions. More importantly, there is nothing in the legislative history of the 1996 Act suggesting that antitrust laws would be abated at the discretion of a court or regulator during the transition to competition in the local market. To the contrary, the legislative history evidenced the Act's drafters' intent that incumbent LECs' pro-competition duties under the 1996 Act would apply concurrently with

antitrust law's penalties for anticompetitive conduct by monopolists. As noted above, Congress made it clear that the antitrust savings clause in the 1996 Act applies *now*, to the nascent competitive local telecommunications market, *in order to ensure the transition to fully competitive local markets,* an intent recognized by the FCC.[7]

As authority for the proposition that the 1996 Act's competitive regime preempts or supersedes existing antitrust laws, the *Goldwasser* court's decision is simply in error. On the other hand, NASUCA does not take issue with the *Goldwasser* court's decision that consumers wishing to pursue private antitrust claims against incumbent LECs must affirmatively plead the elements of a violation of Section 2 of the Sherman Act.

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[7] The *Goldwasser*'s court's assumption that the FCC would pronounce the local markets competitive, at some later date, thereby restoring federal antitrust laws, misapprehends both the nature of the local telecommunications market, and the role of the FCC and state commissions in the local telecommunications market. For one thing, there is no monolithic, national "local market"; instead, there are at least 50 local markets (*i.e.*, each state), each experiencing the transition to competition differently. Setting aside the fact that there is no role in the 1996 Act for the FCC to "declare" the local market open to competition, the Seventh Circuit ignored state commissions' role in determining the competetiveness of their local telecommunications markets. Many states have statutes that expressly provide for various degrees of deregulation once the state commissions determine that a particular telecommunications market within the state is subject to competition. *See, e.g., Del Code Ann. tit.* 26, §§ 705(c) & 709; *Kan. Stat. Ann.* § 66-2005(g); *Ohio Rev. Code Ann.* § 4927.03; *Wash. Rev. Code* §§ 80.36.300 - .330; *W. Va. Code* § 24-2-3c. What effect such state commission decisions would have on the FCC declaration anticipated by the *Goldwasser* court is unclear (*i.e.*, would the FCC defer to prior state commissions' competition determinations and, if so, to what extent). The Seventh Circuit certainly did not consider these questions.

II. RECOGNIZING THAT CONSUMERS RETAIN PRIVATE RIGHTS OF ACTION UNDER ANTI-TRUST LAWS DOES NOT UNDERMINE THE PRO-CONSUMER SCHEME OF THE 1996 ACT.

An underlying concern expressed by the *Goldwasser* court in support of its decision was the court's concern with parties using federal antitrust laws to make an "end run" around the "elaborate system of negotiated agreements and enforcement established by the 1996 Act." *Goldwasser*, 222 F.3d at 401. However, this concern clearly does not apply in situations where, as in the case at bar, the plaintiff asserting antitrust claims against an incumbent LEC is a consumer, a point of distinction correctly noted by the court below. *Bell Atlantic*, 305 F.3d at 110.

Consumers are obviously intended to be the primary beneficiaries of the 1996 Act. Yet consumers are not specifically included in the mechanisms, set forth under Section 252 of the Act, that are primarily designed to encourage new providers' entry into the local market. Clearly, consumers are not parties to the negotiation, arbitration or enforcement of the interconnection agreements in which carriers' competitive relationships are spelled out under Section 252 of the Act. Nor does it appear that consumers can interject themselves into interconnection agreement negotiations or arbitration proceedings.[8] There is

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[8] Many state utility commissions have either denied, or greatly limited, the right of outside parties to intervene in proceedings regarding the approval of negotiated interconnection agreements, or arbitration proceedings regarding such agreements. *See, e.g., Citizens Utility Ratepayer Board v. McKee*, 946 F.Supp. 893 (D. Kan. 1996); *MCI Telecommunications Corp.*, Case No. 97-1210-T-PC (WV P.S.C., November 4, 1997); *In Re: AT&T*, Docket No. P-442, 1996 WL 769097 (MN P.U.C., December 2, 1996); *In Re: Telecommunications Act of 1996*, Case No. U-11134, 1996 WL 593693 (MI P.S.C., September 23, 1996); *In Re: Petition of AT&T for Arbitration*, Docket No. A-310125F0002 (PA P.U.C., November 14, 1996); *In Re: American Communication Services*

no question that Sections 251 and 252 of the Act establish an elaborate regulatory scheme for carriers negotiating and implementing interconnection agreements that mainly incorporate carriers' duties and obligations to each other under the new competitive model. But Section 252 of the Act does not, standing alone, constitute an enforcement mechanism over all anticompetitive conduct on the part of an incumbent LEC. It certainly does not provide an enforcement mechanism for consumers seeking to remedy anticompetitive behavior on the incumbent LEC's part.

This does not mean that antitrust claims are necessarily the only remedies available to consumers to address incumbent LECs' violations of the Act. The court below recognized that consumers may be able to assert claims under Sections 206 and 207 of the Communications Act of 1934 (1934 Act) for harms they suffer as a result of incumbent LEC actions that violate the 1996 Act. *Bell Atlantic*, 305 F.3d at 98, 102-03; 47 U.S.C. §§ 206 & 207.[9] However, the Second Circuit determined that the respondent's claims under Sections 206 and 207 were based on violations of duties under Section 251, duties that the court concluded were complied with when the petitioner executed an interconnection agreement with the respondent's local carrier. *Id.* at 104-05.[10]

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of Little Rock, Inc., Docket No. 96-257-U, 1996 WL 593911 (AR P.S.C., September 19, 1996); *In Re: Provision of Competitive Telecommunications Services*, Docket No. 94-114, 1996 WL 429193 (ME P.S.C., June 25, 1996).

[9] The *Goldwasser* court did not address the applicability of Sections 206 or 207 of the Communications Act of 1934 since the plaintiffs did not plead claims pursuant to those sections.

[10] Verizon relied on this aspect of the Second Circuit's decision in arguing to the FCC that, once it executes an interconnection agreement, the statutory duties set forth in Section 251 no longer apply. However, the FCC rejected Verizon's argument, ruling that incumbent LECs' obligations under Section 251 continue to apply, and may be violated, even where the provisions of the carriers' interconnection agreement are silent regarding the specific conduct the competitor complains of. *See* "Memorandum Opinion and Order," *I/M/O Core Communications, Inc. v. Verizon Maryland Inc.*, File No. EB-01-MD-007, FCC 03-96 (April 23, 2003), at ¶ 25.

Antitrust actions remain, however, the most effective mechanism available to consumers, injured by monopolistic practices, to compel incumbent LECs to comply with antitrust laws and achieve the 1996 Act's goals of fostering competition in the local market. Antitrust remedies are essential in light of the narrow circumstances under which consumers could maintain actions under Sections 206 and 207 of the 1934 Act.

III. RECOGNIZING CONSUMER PRIVATE ANTITRUST ACTIONS FURTHERS THE PRO-CONSUMER SCHEME OF BOTH THE 1996 ACT AND FEDERAL ANTITRUST LAWS.

Recognizing that consumers may bring private antitrust actions against incumbents, regardless of whether the underlying anticompetitive conduct implicates duties and obligations under the 1996 Act, furthers the pro-consumer, pro-competition goals of both regulatory regimes.

First, recognizing that consumers may bring private antitrust actions provides a remedy for those consumers who have been injured by an incumbent's anticompetitive conduct that undermines the goals of the 1996 Act. Although the wrongful denial of access to the local market harms both consumers and competing carriers, the injuries each suffers as the result of anticompetitive conduct on the part of the incumbent are distinct. The competitor suffers lost profits from the wrongful denial of access to the local market, while consumers lose consumer surplus. Randal C. Picker, "Understanding Statutory Bundles: Does the Sherman Act Come with the 1996 Telecommunications Act?" at 10 http://www.law.uchicago.edu/Picker/Papers/Manhattan

200.pdf (*Prepared for a Dec. 9, 2002 conference at the Center for the Digital Economy at the Manhattan Institute).* Professor Picker notes that:

> As a general matter, when a single act hurts multiple parties, each person gets to sue for their losses. This is particularly relevant here, where the possibility of profits is precisely what induces entry—exactly what the 1996 Act seeks to encourage—and the consumer surplus that flows to consumers from entry is one of the core aims of the [1996] Act.

Id.

An incumbent's anticompetitive conduct that violates either or both the provisions of the 1996 Act and antitrust laws, has several possible effects: it may drive up the rates consumers otherwise may pay for local service or, as alleged in this case, reduce the quality of that service; it reduces consumer choice if competitors find it difficult to enter the local market or, having entered, find it difficult to expand or even remain in the market or expand their service territories; and, it may even lead to an erosion of competition in other markets, such as the long distance market, if the local incumbent is able to use its unfairly maintained local monopoly to leverage its position in those markets.[11]

[11] NASUCA hardly considers this latter situation to be academic. Bell operating companies are increasingly winning FCC approval to provide in-region, interLATA service pursuant to Section 271 of the 1996 Act. *See* "§271 Applications Filed With the FCC," http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/. With FCC approval, Bell companies can offer bundled telecommunications packages that include local and long distance wireline service, data services and even wireless services. In a relatively short time since receiving Section 271 approval, Verizon has captured large percentages of the long distance markets: 38% in New York, 34% in Massachusetts, 31% in Connecticut and 20% in Pennsylvania, according to a January 2003 survey. *See* "Verizon Claims Third Largest Market Share in Long Distance Voice" (January 7, 2003) http://www.convergedigest.com/Bandwidth/newnetworksarticle.asp?ID=5971.

Second, there should be no risk of multiple liability in allowing consumer antitrust actions stemming from an incumbent LEC's unlawful anticompetitive conduct. The lost profits that a potential entrant suffers from such conduct "can be cleanly separated from the reduction in consumer surplus inflicted on consumers who lose the benefit of competition between the incumbent and the entrant." Picker, "Understanding Statutory Bundles," *supra* at 15.

Third, excluding private antitrust actions by consumers presents a problem if competitors have insufficient means or incentive to litigate their rights under the 1996 Act. With regard to the former, local competition in many states is provided by small, locally-based competitors rather than large carriers with a national, or even regional presence.[12] Expecting consumers to rely on small, local competitors to litigate zealously against the incumbents for alleged violations of the 1996 Act, and thereby advance the goals and objectives of the 1996 Act, ignores the reality of those competitors' limited resources.

Competitive LECs ("CLECs") may also have less incentive to litigate their rights under the 1996 Act due, ironically, to anti-backsliding regimes adopted by the Bell operating companies in order to win FCC authorization to provide in-state, interLATA telecommunications service under Section

[12] For example, in Kansas, the largest local competitor is Birch Telecom, Inc., which operates in one or two other states and holds about a 7.5% share of the local market Kansas. In West Virginia, the largest local competitor is FiberNet, LLC, which operates exclusively in West Virginia and holds about a 5% share of the local market. Based on its participation in state regulatory proceedings. NASUCA knows that the Kansas and West Virginia are not the only states in this situation. *See* "Local Telephone Competition: Status as of December 31, 2002," Tables 6 & 12 (June 2003) http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0603.pdf.

271 of the 1996 Act. *See* 47 U.S.C. § 271. These anti-backsliding regimes typically consist of carrier-to-carrier metrics, which measure the objective performance of the Bell operating company in implementing its Section 251 obligations across a number of operational areas (typically pre-ordering, ordering, provisioning, repair and maintenance, and billing), coupled with compensatory mechanisms. Failure to achieve the level of performance stated in the carrier-to-carrier metrics results in monetary compensation (usually in the form of bill credits) to those CLECs that are adversely affected by the regional Bell's substandard performance. The first anti-backsliding regime was proposed by Verizon in New York and such regimes have become an integral element in securing Section 271 approval from the FCC.[13] These anti-backsliding regimes do not address all potential incumbent anticompetitive conduct under either the 1996 Act or the antitrust laws.

It is entirely possible that CLECs have, to some degree, been co-opted by these anti-backsliding regimes from litigating ILEC noncompliance with their obligations under Sections 251 and 252 of the 1996 Act. To NASUCA's knowledge, there is no hard data relating to this question. But it is reasonable to assume that the anti-backsliding regimes

[13] *See, e.g.*, "Memorandum Opinion and Order," *I/M/O Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404 (December 22, 1999); "Memorandum Opinion and Order," *I/M/O Application by SBC Communications Inc., et al., for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in Texas*, CC Docket No. 00-65, FCC 00-238 (June 30, 2000); "Memorandum Opinion and Order," *I/M/O Application by Qwest Communications International, Inc. for Authorization To Provide In-Region InterLATA Service in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, FCC 02-332 (December 23, 2002).

have caused at least some CLECs to forego the time and expense associated with bringing claims for violations of the 1996 Act.

Fourth, the ability of the FCC and state commissions to impose fines for anticompetitive conduct by incumbent LECs in violation of the Act does not suffice to protect the consumer interest embodied in the 1996 Act. In their day-to-day role as consumer advocates before state and federal regulatory agencies, NASCUA members can attest to the inadequacy of fines alone to protect those consumer interests expressly identified in the 1996 Act.

Despite incumbent protests to the contrary, it is reasonable to conclude that their management justifies violations of the Act as cost effective compared to compliance. "Merrill Lynch analyst Ken Hoexter, who tracks SBC, wrote earlier this year [2002], 'As long as the cost of violating merger agreements is below the cost of allowing competitors to enter the market, it continues to be cheaper to pay the government.'"[14] Put another way:

> The incumbent loses more from competition than the entrant gains . . . . The incumbent could afford to pay the entrant's damages and have money left over. This just reflects the fact that *as between the incumbent and the entrant, the incumbent's breach is efficient* . . . . We actually need the threat of both [consumer and competitor] suits to deter the breach . . . .

Picker, "Understanding Statutory Bundles," *supra* at 10.

As long as fines are treated by incumbents as a cost of doing business, and in fact a lower cost than facing genuine competition in compliance with the 1996 Act, the local network bottleneck will remain a major obstacle to access to

[14] Peter J. Howe, *Wrong Numbers*, Boston Globe, May 20, 2002, at page C1, columns 2-4.

the network, thereby depriving consumers of the choice of providers intended by the Act.

The local telecommunications market presents multiple, subtle opportunities for anticompetitive conduct to arise. Enforcement of the Act's obligations by competitors may not be effective to remedy or deter monopolistic practices that injure consumers. To overcome these shortcomings, and to achieve the pro-consumer goals embodied in the Act, it is vital to preserve consumers' private rights of action under federal antitrust laws.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed as in the best interest of consumers who are the Congressionally-intended beneficiaries of the antitrust laws and the 1996 Act.

Respectfully submitted,

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IN THE

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VERIZON COMMUNICATIONS, INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AT&T CORP., CAVALIER TELEPHONE, AND COMPETITIVE TELECOMMUNICATIONS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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LEGISLATIVE HISTORY

Hearing Before the Subcomm. on Econ. & Commercial Law, House Comm. on the Judiciary, pt. 2, 102d Cong. (1992) (and legal opinions of P. Areeda, R. Bork, and L. Sullivan therein referenced) ..... *passim*
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INTERESTS OF *AMICI CURIAE*[1]

AT&T Corp. ("AT&T"), Cavalier Telephone, L.L.C. ("Cavalier"), and the Competitive Telecommunications Association ("CompTel") each has an acute interest in the question of how the antitrust laws apply to conduct that is also subject to the Telecommunications Act of 1996. *Amici* are also uniquely situated to provide information relevant to the resolution of this case and the issues that it raises.

In addition to providing long distance services, AT&T provides local telephone service throughout the United States by leasing combinations of all elements of incumbent local exchange carrier networks, by combining leased local loops with switches and other facilities that AT&T provides, or through other arrangements. Respondent's claims in this case are derivative of injuries that are alleged to have been suffered by AT&T.

Cavalier provides local services in seven markets in the mid-Atlantic and southeastern United States by obtaining unbundled loops and combining them with Cavalier's switching, transport, and other facilities. Cavalier has brought an antitrust action that makes explicit allegations of myriad ways in which Verizon has maintained local monopolies by denying access to essential facilities. *Cavalier Tel., LLC* v. *Verizon Va., Inc.*, 330 F.3d 176 (4th Cir. 2003), *amended* 2003 WL 21299893 (4th Cir. June 6, 2003) (petition for certiorari to be filed on August 18, 2003) ("*Cavalier*").

Finally, CompTel is the oldest and largest industry trade association representing competitive telecommunications providers.

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[1] No counsel for a party has written this brief in whole or in part and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondent have consented to the filing of this brief.

INTRODUCTION AND BACKGROUND

Although this case presents a threshold issue of consumer standing, the United States and Federal Trade Commission (collectively "DOJ") and petitioner Verizon have seized upon the case to advance an extraordinary claim. They ask the Court to repudiate antitrust principles that were previously urged by the Ford, Carter, Reagan, and Clinton Administrations; that have been adopted by six federal courts of appeals; that were the basis for the landmark Decree that broke up the Bell System; and that have been endorsed by the nation's leading antitrust scholars (Phillip Areeda, Robert Bork, and Lawrence Sullivan), both in their writing and in congressional testimony in the proceedings that led to the Telecommunications Act of 1996 ("1996 Act").

Respondent's Complaint alleges that Verizon has maintained its local telephone monopolies by willfully violating FCC regulations that require incumbents to provide would-be rivals with access to essential "inputs" into local telephone services at rates that are compensatory, but that deny the incumbents the supracompetitive returns that they could earn by providing the "downstream" local services themselves. The regulations in question are modeled on those that the FCC previously adopted to open long distance and equipment markets to competition. The earlier FCC regulations (like the new ones) provided incumbents with economic incentives to delay or deny the required access in order to maximize profits in the short (as well as long) term.

In this indistinguishable context, the prior administrations argued, and courts of appeals uniformly held, that conduct that maintained monopolies by willfully violating these access regulations constitutes monopolization under § 2 of the Sherman Act. In particular, rather than legitimizing the defendant's conduct, the fact that the incumbents had incentives to violate access regulations designed to foster competition and produce lower prices for consumers was there treated as establishing that the conduct served no

legitimate business purpose and as *increasing* the need for antitrust enforcement.

In this case, DOJ and Verizon urge the opposite rule. They assert that the fact that an incumbent's conduct evaded access regulations in order to maximize its short-run profits conclusively establishes the legitimacy of the conduct. In this regard, DOJ acknowledges, as it must, that the general rule is that conduct that maintains a monopoly by willfully violating procompetitive duties "extrinsic" to the antitrust laws has no "legitimate business purpose" and constitutes willful exclusionary conduct that will support a monopolization claim. But DOJ and Verizon claim that the antitrust *savings* clause of the 1996 Act – which provides that nothing therein shall be construed to affect the "applicability" of the antitrust laws – requires that antitrust cases be decided as if the 1996 Act had never been passed. As demonstrated below, that view cannot be reconciled with antitrust laws or the terms, history, or purposes of the savings clause. DOJ and Verizon also advance new antitrust theories that have no support in case law and that would create antitrust immunity for the conduct that presents the clearest violation of the objects of the antitrust laws.

Moreover, this is a singularly inappropriate case in which to consider limiting accepted antitrust principles. The case was brought by a consumer, which is asserting injuries that are derivative of harms suffered by AT&T and which has no knowledge of any of the details of the relationships between incumbent local exchange carriers and competitive carriers. Further, while the Complaint asserts that AT&T provides respondent's service by leasing local loops and other unbundled network elements under the 1996 Act, that is incorrect.[2] Resolution of the question of the relationship of

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[2] AT&T provides local and other services to respondent through AT&T switches that are connected to respondent's premises over Verizon

the antitrust laws and the 1996 Act will have no effect on the ultimate disposition of this case. Thus, unless the case is resolved for lack of standing, the Court should consider dismissing the writ in this case and addressing the issues in *Cavalier* or another pending case that squarely raises these antitrust issues.

1. Prior to the late 1960s, all telecommunications services and equipment in the United States were provided by the monopolies that were franchised by state utility commissions to serve designated geographic areas and that are now known as "incumbent local exchange carriers" or "ILECs." The Bell Operating Companies ("BOCs") – which were then owned by AT&T – collectively provided telephone service and equipment to more than 80% of the nation's customers. The remainder of the country was served by some 1400 "independent" (*i.e.*, non-Bell) ILECs.

The ILECs then provided end-to-end local and long distance service that included telephone instruments and any attachments to them ("customer premises equipment" or "CPE"). Further, long distance service was a monopoly that was jointly offered by a "partnership" of all the ILECs and the Long Lines Department of AT&T.[3]

In the late 1960s, the FCC attempted to introduce competition into long distance services and the provision of

facilities that it provides by tariff under §§ 201-205 of the Communications Act, 47 U.S.C. §§ 201-205.

[3] In particular, all the ILECs were interconnected to one another either directly or through interstate facilities owned by AT&T Long Lines, and long distance service was a joint offering (managed by AT&T Long Lines) in which each company was responsible for the transmission facilities within its territories and in which revenues were divided in proportion to each company's share of the national network.

CPE.[4] The FCC adopted regulations that required ILECs to reconfigure their end-to-end services so that CPE and long distance service were unbundled from local service – such that customers could obtain local services from the incumbent and obtain long distance service or CPE from competitors. Because new entrants could not offer competing services unless they or their customers could access the ILECs' local loops and other facilities on reasonable terms, the FCC further adopted interconnection regulations that were designed to confer these wholesale access rights.

Contrary to Verizon's revisionist claims (Br. 41-43), the FCC regulations in each case required incumbents to establish something "brand new." Incumbents were *not* voluntarily offering these access arrangements to any customers at the same rates and terms.

First, in the case of telephone equipment, the ILECs' tariffs had required that they provide not only telephone instruments (and office telephone systems), but also any equipment that was acoustically or inductively attached to telephone instruments. In 1968, the FCC invalidated these tariffs and directed ILECs to submit new tariffs that would protect the network from harm and that may specify technical standards for interconnected equipment. *Carterfone*, 13 F.C.C.2d 420, 426 (1968); see *Phonetele, Inc.* v. *AT&T Co.*, 664 F.2d 716, 724 (9th Cir. 1981) (Kennedy, J.).

The incumbents responded by filing tariffs that allowed acoustical or inductive connections of equipment that ILECs did not install, but prohibited electrical connections of any equipment performing network control signaling on the ground that that would harm the network. Customers had to either (1) obtain incumbents' telephone instruments and systems (which had built-in network control signaling units)

[4] *See Carterfone*, 13 F.C.C.2d 420 (1968); *Microwave Communications*, 18 F.C.C.2d 953 (1969); *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd*, 513 F.2d 1142 (9th Cir. 1975).

or (2) if they obtained the equipment from third parties, connect it through expensive equipment (called "protective connecting arrangements" or "PCAs") that provided the signaling and that incumbents supplied. See *id.* at 725-26.

Over the next seven years, incumbents maintained this PCA requirement and opposed its elimination before the FCC on the ground that it was necessary to protect the network from harm. In 1975, the FCC found that these PCA restrictions were unnecessary and invalidated them. One antitrust court found that the ILECs' imposition of the PCA requirement was unlawful and their advocacy of its retention before the FCC was sham litigation that had unlawfully maintained their CPE monopoly. *Litton Sys., Inc.* v. *AT&T Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983). Antitrust liability was thus imposed based on the incumbents' failure to offer "never-before-offered terms:" telephone service without ILEC-provided network control signaling devices. Compare Verizon Br. 19.

Similarly, the FCC regulations sought to open long distance markets to competition by authorizing MCI and other "specialized common carriers" to construct intercity transmission facilities and to interconnect with the ILECs' local distribution facilities on the two ends of each long distance call. Here, too, the FCC regulations required incumbents to offer something "brand new" (now called "exchange access" services) at regulated rates that did not recover the margins ILECs earned on their own retail services.[5] Here, too, the same rates, terms and conditions were not voluntarily provided to any other customer.[6] It was

[5] For switched services, the rates paid by the specialized carriers represented discounts of 55% off the revenues that ILECs received for use of their local exchange facilities under the division of revenue contracts that ILECs had with AT&T Long Lines. *Exchange Network Facilities for Interstate Access (ENFIA)*, 71 F.C.C.2d 440 (1979).

[6] Verizon is misstating the facts in asserting (Br. 13, 42) that ILECs provided "the same services" at the same rates and terms to Western Union, to end user customers, or to independent telephone customers. First, the MCI jury rejected the claim that AT&T had discriminated in favor of Western Union and against MCI. *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1208 (7th Cir. 1983) (Interrogatory Answer 5(d)). Second, Verizon notes that MCI had sought to support a tying claim by "*argu[ing]* that AT&T had sold these interconnections as a separate product to local customers, independent telephone companies and others for years," but the Court of Appeals did not accept this tying claim. *Id.* at 1144 (emphasis added). Third, Verizon relies (Br. 42) on out-of-context quotations of language from an FCC Order. But that order made it explicit that AT&T Long Lines and independent telephone companies used their local distribution facilities as part of end-to-end services in which they were "partners in the joint provision of interstate [long distance] services," that the facilities had not been separately offered to any third party, and that the FCC had ordered new wholesale arrangements in order to allow long distance competition. *Bell Sys. Tariff Offerings*, 46 F.C.C.2d 413, 426-430 (1974).

precisely because incumbents were not voluntarily providing this access service to other customers that the FCC conducted several multi-year proceedings to determine the rates, terms, and conditions that should apply to this new wholesale "exchange access" service that ILECs provide to long distance carriers.[7]

The incumbents also violated the FCC's access regulations. For example, they delayed MCI's entry into long distance markets by denying it local distribution facilities for use in providing certain long distance services (*e.g.*, Foreign Exchange and Common Channel Signaling) on the ground that these services had not been authorized by the FCC. This conduct, and several other acts that impaired MCI's access to local distribution facilities, were later found to be bad faith violations or evasions of FCC access regulations that constituted unlawful monopolization. See *MCI*

[7] *See, e.g., Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C.2d 727 (1975); *Exchange Network Facilities for Interstate Access (ENFIA)*, 71 F.C.C.2d 440 (1979); *Exchange Network Facilities for Interstate Access (ENFIA)*, 90 F.C.C.2d 6 (1982).

Communications Corp. v. *AT&T Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

2. This same conduct was subsequently challenged in more than 70 private antitrust actions and in a DOJ lawsuit that sought to break up the Bell System. In each of these suits, the central allegation was that BOCs had violated the antitrust laws by denying competitors reasonable access to essential facilities, and that the conduct had no legitimate business purpose because it violated the FCC's access regulations.

For example, rather than meet the pleading and proof standards that DOJ would have the Court apply in this case, DOJ's complaint simply asserted that the Bell System's denials of access to long distance providers and equipment manufacturers had anticompetitive effects. See *United States* v. *AT&T*, Complaint, Civ. No. 74-1698 (D.D.C. filed Nov. 20, 1974). DOJ relied on "one central point": "that because the Bell System . . . possesses a monopoly in the distribution of local telecommunications services, meaningful competition in the provision of inter city [long distance] services is precluded unless the non-Bell carriers are able to obtain interconnection with the Bell local distribution facilities under non-discriminatory terms and conditions." *United States* v. *AT&T*, 524 F. Supp. 1336, 1352 (D.D.C. 1981).

The Bell System moved to dismiss each of the foregoing cases on the grounds that the FCC's regulations had created the competitive opportunities in equipment and long distance markets and that the lawfulness of the Bell System's conduct was pervasively regulated and should be governed exclusively by the Communications Act and state regulations. Courts uniformly rejected all those "implied immunity" and "state action" arguments.

As the *MCI* court stated, "the interconnection policies adopted by the FCC during the time period relevant to this litigation appear designed to promote rather than inhibit competition in the specialized telecommunications field.

Thus, the allowance of antitrust liability is likely to complement rather than undermine the applicable statutory scheme." 708 F.2d at 1104. As then Judge Kennedy stated, the fact the challenged conduct had been later held to violate FCC regulations meant that "applying the antitrust laws . . . involves no conflict between pro-competitive antitrust policies and agency policies" and when conduct also violates antitrust standards, Congress intended that antitrust remedies (treble damages) would "supplement" the more limited remedies available under the Communications Act. *Phonetele*, 664 F.2d at 733-35. *Accord Essential Communications Sys., Inc.* v. *AT&T Co.*, 610 F.2d 1114, 1117 (3d Cir. 1979); *Southern Pac. Communications Co.* v. *AT&T Co.*, 740 F.2d 980, 994, 999-1000 (D.C. Cir. 1984); *Litton*, 700 F.2d at 807; *Mid-Texas Communications Sys., Inc.* v. *AT&T Co.*, 615 F.2d 1372, 1377-82 (5th Cir. 1980).

At the same time, because courts recognized that FCC access regulations were often unambiguous, they held that antitrust liability should not be imposed if incumbents actually had objectively reasonable good faith beliefs that their conduct satisfied the FCC's regulations. *Southern Pac.*, 740 F.2d at 1009-11; *Phonetele*, 664 F.2d at 737-38; *MCI*, 708 F.2d at 1138; *Mid-Texas*, 615 F.2d at 1380. Under the uniform courts of appeals' holdings, antitrust liability could be imposed only if there were a bad faith or willful violation of the access requirements.

While nearly all of the 70 private antitrust actions were settled, in several cases juries found antitrust liability and substantial treble damages judgments were entered. See *MCI*, 708 F.2d at 1092; *Litton*, 700 F.2d at 789.

3. These cases resulted in the compilation of records that demonstrated that antitrust enforcement is an essential complement to the FCC's efforts to foster competition through access regulations. The evidence was that complexity of local exchanges gave the incumbents the "ability" to evade whatever regulations were adopted. It

further showed that the rate regulation of the local facilities gave the incumbents overwhelming and irresistible "incentive[s]" to commit these evasions because that would maximize their profits in the short run (as well as in the long run). *United States* v. *AT&T*, Competitive Impact Statement, 47 Fed. Reg. 7170, 7171-74 (1982).

First, the evidence in *United States* v. *AT&T*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981), was that BOCs had the ability to evade any access regulations. In particular, due to the complexity and dynamic nature of local exchanges, FCC and state regulations that defined rights of access to exchanges could never foresee and proscribe in advance all the forms of possible anticompetitive conduct. BOCs could always seize upon real or contrived ambiguities in regulations – or claims of technical infeasibility – to justify delaying or denying a necessary access arrangement. Further, they could frustrate the implementation of the access arrangements that they did provide in subtle ways that regulators often could not detect. Even if a specific exclusionary practice were identified and prohibited, BOCs could "shift from one anticompetitive activity to another." *United States* v. *AT&T*, 552 F. Supp. 131, 167 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983).

Second, DOJ's evidence showed that the rate regulation of the local loops and other monopoly access facilities meant BOCs had irresistible incentives to engage in this conduct in order to obtain monopoly returns in the less regulated or unregulated long distance or equipment markets. DOJ's evidence was that regulatory remedies were palpably insufficient to deter this conduct, and given the formidable difficulties of proof, even the threat of treble damages under the antitrust laws could be insufficient.

DOJ contended that the only remedy that could prevent recurrence of the challenged conduct was structural separation of the BOCs' local exchange monopolies from competitive long distance and equipment businesses. *Id.* at 139-44. In order to eliminate the threat of antitrust lawsuits

and judgments, AT&T, on behalf of the Bell System, stipulated to an antitrust decree (the MFJ) that granted the relief that DOJ had sought. The MFJ (1) required that the Bell System be split between its local operations (assigned to the BOCs) and its long distance and equipment operations (assigned to AT&T) and (2) barred the BOCs from providing long distance service for so long as they had local monopolies. *Id.* at 160-70, 186-89. However, the MFJ did nothing to eliminate local exchange monopolies.

The MFJ proved to be one of the most successful remedies in antitrust history and led to the development of intensely competitive long distance and CPE markets.

4. Beginning in the late 1980s, the BOCs sought legislative repeal of the MFJ's line of business restrictions. This legislation was opposed by AT&T (and many others).

AT&T submitted to Congress written opinion letters from the nation's three leading antitrust scholars – Robert Bork, Phillip Areeda, and Lawrence Sullivan.[8] Judge Bork and Professor Areeda stated that while vertical integration is ordinarily benign and generally should not be restricted under the antitrust laws, an entirely different calculus applies when a firm controls rate-regulated monopoly local facilities that are essential inputs into long distance services or other downstream markets that are unregulated or less regulated.[9] In this context, they explained that because the incumbent monopolist will seek to maximize its profits, it will have powerful incentives to deny competitors access to natural

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[8] *See Hearing Before the Subcomm. on Econ. & Commercial Law, House Comm. on the Judiciary*, pt. 2, 102d Cong. 40 (1992) (referencing legal opinions attached to Statement of Robert E. Allen, CEO, AT&T Corp.; hereinafter "Areeda Op.," "Bork Op.," and "Sullivan Op.," *available at* www.pulver.com/documents/AreedaOpinion1.pdf; www.pulver.com/documents/BorkOpinion1.pdf; and www.pulver.com/documents/ SullivanOpinion.pdf).

[9] *See* Areeda Op. 8-11; Bork Op. 3-4.

monopoly inputs in order to evade the rate regulations and to continue to earn supracompetitive profits in the retail downstream market.[10] Each of these antitrust experts stated that such conduct would violate the antitrust laws.[11] Each also agreed that regulation is incapable of identifying in advance and preventing each form of misconduct that can occur.[12]

5. In the 1996 Act, Congress adopted a new chapter of the Communications Act (47 U.S.C. §§ 251-261) that is designed to open local telephone markets to competition as quickly as possible and to drive rates for local exchange and exchange access services towards competitive levels.[13]

In addition to offering "resale" rights (*id.* § 251(c)(4)), the Act authorizes any requesting carrier to access loops, switches, transport, or other unbundled "elements" of the incumbent's network at cost-based rates and to use them to offer any telecommunications service. *Id.* § 251(c)(3). Under this provision, new entrant competitive carriers ("CLECs") can offer service by leasing combinations of loops, transport and switching, and providing other necessary facilities, retail functions, or value-added services themselves – which Verizon (Br. 6 n.7) falsely asserts to be the equivalent of "resale." CLECs also have the right to lease just the local loops and offer service by connecting those loops with switching facilities that the CLEC itself provides, which Verizon acknowledges to be facilities-based competition.

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[10] *See* Areeda Op. 2-5, 38-39; Bork Op. 4-7.

[11] *See* Areeda Op. 64-65; Bork Op. 7-14.

[12] *See* Areeda Op. 3-4, 11-12; Bork Op. 6-7; *see also* Sullivan Op. 11-13.

[13] Although the 1996 Act vacated the MFJ (47 U.S.C. § 152 note), Congress simultaneously codified the MFJ's long distance services restriction until such time as measures designed to open local services to competition were fully implemented (*id.* § 271).

Further, when carriers establish complete networks of their own loops, switching, and transport, they have the right to "interconnect" their networks with the incumbent's and arrange for exchange of traffic between the two networks. 47 U.S.C. § 251(c)(2).

In implementing the 1996 Act's mandate that network element and interconnection rates be "based on . . . cost," *id.* § 252(d)(1), the FCC adopted the TELRIC pricing standard that entitles ILECs to recover the full economic costs of providing such access, but denies them the supracompetitive returns that they currently earn on the local exchange services provided to retail customers and exchange access services provided to long distance carriers. See *Local Competition Order*, 11 FCC Rcd. 15,499, 15,850-15,860, ¶¶ 690-711 (1996). The Commission did so in order to drive rates for the latter services closer to economic cost and thereby "replicate[] . . . the conditions of a competitive market." *Id.* at 15,846, ¶ 679. Because of the prospects of this competition, regulatory authorities have declined to engage in meaningful regulation of rates for incumbents' exchange and exchange access services. *E.g.*, *Access Charge Reform*, 12 FCC Rcd. 15,982, 16,088-16,089, ¶¶ 249-252 (1997).

6. The ILECs have acted on their economic incentive to delay, frustrate, and often to deny access and interconnection to CLECs. Incumbents have done so through courses of conduct that have featured sham litigation, fraudulent misrepresentations, acts of sabotage, and outright denials of access to particular facilities, as well as refusals to provide facilities on the terms required by regulation.

In this regard, the Complaint in this case lacks relevant information. It was drafted by a customer which inherently lacked information about any of the actual details of the relationships between ILECs and CLECs, and the Complaint is therefore a vague, conclusory, and, in some respects, inaccurate document (*e.g.*, *supra* at 3 n.2). There is no way any *amicus* brief can provide a full picture of the kinds of

conduct that has occurred, and unless the Court is disposed to decide this case on other grounds or summarily to reject the positions advanced by Verizon and DOJ, *amici* urge the Court to dismiss this case as improvidently granted and address the issues in a case that presents an actual record of Verizon's conduct (or at least a detailed set of allegations).

But the experience of *amicus* Cavalier will provide the Court with some sense of the kind of conduct that has occurred. Cavalier (like AT&T and many other members of CompTel) is not a "reseller." Cavalier has installed its own switches and has often linked them together through its own transport facilities. But Cavalier must lease local loops from Verizon to provide service.

Verizon has engaged in a course of bad faith conduct that has prevented Cavalier from effectively competing with the Verizon monopoly. First, after Cavalier's initial network was operational, Verizon refused to interconnect and delayed Verizon's entry for five months on the sham ground – foreclosed by the plain terms of the Act – that Verizon was entitled to deny access until Cavalier first obtained state certificates. *Cavalier Tel., LLC* v. *Verizon Va., Inc.*, Complaint, No. 01-CV-736, ¶ 49 (E.D. Va. filed Nov. 1, 2001). Thereafter, Verizon denied Cavalier access to the types of loops used by 25% of customers by making sham claims – later proven false – that providing access to these loops was technically impossible. *Id.* ¶¶ 92-93.

Verizon further negotiated in bad faith over details of access in individual offices, making fraudulent assertions about unavailability of space, refusing to timely process orders when it became apparent that space was available, and delaying access to particular facilities for periods of up to two years and longer. This is a small fraction of the conduct which is the basis for the antitrust claims that are at issue in *Cavalier*, and that the Fourth Circuit dismissed because it accepted the antitrust theories that DOJ and Verizon are here advancing.

SUMMARY OF ARGUMENT

As DOJ states (Br. 23-24), respondent's complaint is fairly read as alleging that Verizon maintained its local monopoly by willfully violating FCC regulations that required it to provide AT&T and other competitors with access to facilities (local loops) essential to the provision of local exchange service at rates set pursuant to the cost-based "TELRIC" standard. DOJ contends that this allegation should be deemed facially insufficient to state a § 2 claim because (i) TELRIC rates do not afford Verizon the profit margins that it would earn if it used the local loops to provide its own "downstream" retail local exchange and other services, and (ii) the complaint contains no cost or other allegations that, notwithstanding the difference between wholesale and retail profit margins, Verizon's conduct reflected a "sacrifice" of short-term profits (*e.g.*, based on the fact that Verizon's conduct subjected it to the risk and, here, actuality, of substantial fines).

Verizon and DOJ assert two basic reasons why the absence of specific allegations that the access denials were contrary to Verizon's short-term interests should prove fatal to the complaint. First, although they acknowledge the general antitrust principle that violations of such duties "extrinsic" to the antitrust laws constitute willful exclusionary conduct (DOJ Br. 12 n.3), they contend that the 1996 Act's antitrust *savings* clause prohibits the application of this general antitrust standard here. In their view, that provision means that antitrust challenges to conduct subject to the 1996 Act must somehow be decided as if the 1996 Act's duties do not exist.

Second, DOJ and Verizon make arguments about the meaning of "unadorned" antitrust standards that purportedly apply when the regulatory context established by the 1996 Act is ignored. Here, they contend that determinations whether exclusionary conduct constitutes monopolization turn

on whether the conduct violates a "negative" duty (such as refraining from fraudulent claims or sham litigation) or an "affirmative" duty (such as failing to share essential facilities). Because refusals to deal involve "positive" duties, DOJ contends such conduct cannot violate the antitrust laws unless it reflects sacrifice of an incumbent's short-run profits.

Both claims are baseless. The antitrust savings clause merely provides that nothing in the 1996 Act shall be construed to affect the "applicability" of the antitrust laws to conduct subject to the 1996 Act. It operates only to preclude claims that this conduct is impliedly immune from antitrust laws. It does not affect the rule that antitrust standards must be applied in light of the regulations that govern an industry. Indeed, under DOJ's and Verizon's view, the savings clause would destroy itself. It would immunize from liability conduct that would be held to violate the antitrust laws if there were no savings clause.

DOJ and Verizon are wrong in contending that there is a categorical rule that refusals to deal cannot violate the antitrust laws unless they represent short-run sacrifices of monopoly profits (much less that there is no need even to inquire into whether there is such a sacrifice unless the defendant has denied rivals access on the same rates and terms as were voluntarily made available to non-rivals). This Court has upheld judgments condemning refusals to deal that were plainly unaccompanied by such "sacrifices" in *Otter Tail* and *Aspen Skiing*, and no refusal to deal decision has ever adopted the test that DOJ and Verizon propose.

Moreover, the distinctions that DOJ would draw between negative and affirmative duties cannot, particularly in this context, be squared with any rational theory of the antitrust laws. DOJ's approach would depend on arbitrary characterizations of different acts that are part of a single course of conduct and would treat acts that have the same anticompetitive purposes and effects differently depending on whether they were characterized as affirmative or negative.

Further, DOJ's approach would result in the absurdity that access denials that created the greatest harm to competition (denying interconnection to firms with complete alternative local networks) would be the *least* likely to result in antitrust liability.

ARGUMENT

I. THE ALLEGATION THAT VERIZON HAS MAINTAINED ITS MONOPOLY BY VIOLATING FCC ACCESS REGULATIONS STATES A CLAIM FOR MONOPOLIZATION.

DOJ's and Verizon's arguments appear to rest on a simple misconception of the relationship between antitrust standards and regulatory requirements. For example, DOJ appears to believe that if *some* conduct that violates the 1996 Act also violates the antitrust laws, then it must be the case that the antitrust laws impose the same or "similar" duties as the Telecommunications Act (DOJ Br. 1), or that the Second Circuit "imported" Telecommunications Act duties and standards into the antitrust laws and "conflated" the two (*id.* at 6, 8, 24). This is the basis for DOJ's palpably erroneous assertion that the Second Circuit's holding means that any violation of the 1996 Act is *ipso facto* a violation of the antitrust laws. *Id.* at 7.

As the Second Circuit recognized, antitrust cases are decided by applying *antitrust* standards to challenged business conduct that occurs in particular market and regulatory contexts – in order to implement the antitrust objective of maximizing "'consumer welfare.'" *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). Regulation and regulatory duties have no effect on the antitrust *standards*. They can, however, profoundly affect the *judgments* that are reached under antitrust standards, for in applying the antitrust laws, the "impact of regulation must be assessed simply as another fact of market life," and "'the antitrust court must

consider the peculiarities of an industry as recognized in a regulatory statute.'" *Phonetele*, 664 F.2d at 742 (Kennedy, J.) (quoting 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 223d (1978)).

Under § 2 of the Sherman Act, the antitrust offense of monopolization has two elements: (1) the possession of monopoly power in the relevant market and (2) the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Under these standards, many violations of the 1996 Act will not violate the antitrust laws. For example, if the threshold requirement of monopoly power is not met, no conduct that violates the 1996 Act would violate antitrust laws.

Here, monopoly power is adequately pled, and the issue is whether there are sufficient allegations of conduct that constitute the "willful acquisition or maintenance of that [monopoly] power." *Id.* This element has two sub-elements. Foremost, the challenged conduct must "reasonably appear capable of making a significant contribution to creating or maintaining monopoly power." 3A P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 651f, at 83-84 (2d ed. 2002). Much conduct that violates the 1996 Act would not satisfy this standard. For example, failures to provide access to those unbundled network elements that are not also essential facilities may adversely affect some individual competitors, but may have no potential effect on many other entrants and thus have no capacity to create or maintain a monopoly. Compare *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 510 n.27 (2002). As DOJ notes, however, this standard is met by the Complaint's allegations that Verizon has denied reasonable access to an essential facility (the local loop) that is required to compete in the market and cannot be duplicated because of the facility's natural monopoly characteristics. DOJ Br. 22 n.6.

The final question, and the one most relevant here, is whether the conduct that maintains monopoly is "willful." Willful conduct is conduct that "'either does not further competition on the merits or does so in an unnecessarily restrictive way.'" *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (1985). The Court has defined "willful" conduct to mean conduct that is "predatory" or "exclusionary," *i.e.*, that excludes rivals on some basis other than efficiency, or that advances no "legitimate business purpose." *Id.* at 605. In this regard, the Court has approved jury instructions that simply state that refusals to deal are unlawful if they advance no "legitimate business reasons." *Id.* at 597. As Prof. Areeda stated, monopolization requires some element of impropriety; it requires "monopoly power coupled with some impropriety in its achievement."[14]

At the same time, in determining if the conduct is "willful," courts seek to assure that "procompetitive behavior" or other desirable behavior is not chilled. *Eastman Kodak Co.* v. *Image Technical Servs. Inc.*, 504 U.S. 451, 479 (1992); *Town of Concord, Mass.* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (courts "compare the challenged practice's likely anticompetitive effect with its potentially legitimate business justifications") (Breyer, J.). These determinations are made in the particular regulatory context in which the defendant acts. *Id.*

The application of these criteria here is straightforward. Verizon is alleged to have denied access to a natural monopoly facility (the local loop) that is essential to allowing competition in switching or other "unshared" portions of the exchange. This is a context in which, in Judge Posner's words, "cooperation is indispensable to effective competition," *Olympia Equip. Leasing Co.* v. *Western Union*

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[14] P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 846 (1990) ("Areeda").

Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986), and in which sharing would "substantially . . . improve competition in the marketplace." 3A *Antitrust Law* ¶ 773 at 197.

Further, there is a clear "element of impropriety" here, for Verizon is alleged to have violated access regulations that are "extrinsic" to the antitrust law.[15] Contrary to DOJ's belief (Br. 24), when an antitrust court relies on duties "extrinsic" to the antitrust laws in making determinations that a monopoly has been "willfully" acquired or maintained, it is not "import[ing]" standards from other laws into the antitrust laws. Rather, the extrinsic duties are "fact[s] of market life" that aid the *antitrust* determination whether the conduct that maintained the monopoly is ordinary profit maximizing behavior that the law should not inhibit (building a better mousetrap) or conduct that serves no legitimate business purpose and excludes rivals for reasons having nothing to do with efficiency. It is precisely because the antitrust laws are not a "license for courts to create codes of desirable business behavior" (DOJ Br. 9) that these determinations must rely on the independent body of common law, statutes, and regulatory rules that define and channel legitimate business behavior and competition on the merits in that market. Otherwise, it would be open to competitors to argue that it is legitimate for them to maintain monopolies through such "profit maximizing" conduct as enforcing fraudulently obtained patents (*Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172 (1966)), engaging in sham litigation that is a tortious abuse of process (*California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972)), or even dynamiting competitors' plants.

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[15] As DOJ concedes (Br. 12 n.3), it is well-settled that "where conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find that conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws." ABA, *Antitrust Law Developments* 249 (5th ed. 2002).

These principles have special force here. The antitrust laws are a "consumer welfare prescription" and are to be implemented in the ways that will maximize "consumer welfare." *Reiter*, 442 U.S. at 343. Here, the regulations that Verizon has violated rest on regulatory findings that local loops are natural monopolies and that making them available at TELRIC-based rates protects all legitimate interests of incumbents, is essential to allow competition in local exchange and exchange access services, and will produce lower prices for consumers in these downstream markets.

As the commentators on whom DOJ and Verizon rely note, this presents the "strongest" case for a finding of an unreasonable refusal to deal. 3A *Antitrust Law* ¶ 773 at 197 ("argument for forcing access is therefore strongest in the case of a price-regulated monopolist whose denial of access aids it in evading rate regulation or undermines the regulator's plan to encourage rivalry either in the primary or adjacent market"); Bork Op. 4-6 & *supra* at 11 n.9; see *Town of Concord*, 915 F.2d at 29 ("[a] special [antitrust] problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first").

The existence of regulatory requirements also eliminates any basis for concern that antitrust liability would chill procompetitive behavior. In this regard, DOJ and Verizon cite three reasons why refusals to share facilities should seldom violate the antitrust laws: reduced incentives to invest in alternative facilities, risks of collusion, and administrative difficulties for courts and juries in determining the terms and fair price for sharing. 3A *Antitrust Law* ¶ 771b at 171-72. As the commentators on whom DOJ and Verizon rely again note, none of these considerations applies when there is an independent regulatory requirement that a natural monopoly facility be shared at a regulated non-monopoly price. *Id.* ¶ 726e at 217-18; see also *supra* at 11-12 & nn.9-12 (views of

Judge Bork and Profs. Areeda and Sullivan). The "extrinsic" regulatory duty imposed by the 1996 Act independently creates the same risks of collusion or reduced investment, and because the unreasonable refusal to deal is a bad faith violation of the regulation's terms (determined by existing state and federal regulators), there are no administrative burdens on courts. See Areeda, *supra* at 19 n.14, at 853 (antitrust remedies appropriate when "a regulatory agency already exists to control the terms of dealing").

In this context, the only argument against antitrust liability is that a regulatory agency is theoretically available and in a better position to determine the scope and terms of any duty to deal. 3A *Antitrust Law* ¶ 773 at 197. That argument has no force when the conduct has been found to violate the access regulation. Further, even in other contexts, if there were any concern about inhibiting conduct that might satisfy regulators, antitrust liability could be limited here – as it was in prior antitrust cases against the Bell System – to conduct that the defendant did not reasonably believe in good faith to satisfy regulatory standards. See *supra* at 9.

II. THE 1996 ACT'S ANTITRUST SAVINGS CLAUSE DEFEATS DOJ'S AND VERIZON'S CLAIMS.

Against this background, Verizon's and DOJ's claims based on the savings clause are spurious. DOJ acknowledges that violations of duties "extrinsic" to the antitrust laws are relevant to determining if a monopoly has been acquired or maintained through illegitimate means, but it contends that the savings clause means that the antitrust laws cannot "outlaw conduct that, but for the 1996 Act, would not violate the antitrust laws." DOJ Br. 11, 14 n.5, 18, 24-25 & n.10.

DOJ has matters backwards, for three reasons.

First, the language and history of the savings clause foreclose these claims. Even if consideration of the duties imposed by the 1996 Act would expand the "standards" and "scope of the antitrust laws" (DOJ Br. 11, 24) – which it

would not – the savings clause does not say that the Act is to have no effect on the scope of antitrust laws. Rather, it says that "nothing in this Act . . . shall be construed to modify, impair, or supersede the *applicability* of any of the antitrust laws." 47 U.S.C. § 152 note. As the legislative history makes explicit, this clause is designed to prevent claims that antitrust law is inapplicable to conduct regulated by the 1996 Act,[16] and Congress adopted this clause because it understood – based on the experience of introducing competition into long distance and equipment markets – that antitrust enforcement is an essential supplement to efforts to open telecommunications markets to competition through access regulations.

Second, DOJ's and Verizon's claim would be wrong even if the savings clause stated that the Act shall not be construed to affect the "scope" or "standards" of the antitrust laws. As explained above, *supra* at 17-18, antitrust standards require that monopolization determinations be made on the basis of the regulatory duties and other "facts of market life" in an industry, and when courts do so, they are not "importing" standards from other statutes into the antitrust laws or expanding the scope of the antitrust laws. They are applying the established preexisting antitrust standards in accord with their terms and purposes. In this regard, it would be a

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[16] *See, e.g.*, H.R. Conf. Rep. No. 104-458, at 201 (1996) (savings clause "prevents affected parties from asserting that the bill impliedly preempts other laws"); S. Rep. No. 104-230, at 201 (1996) (same); S. Rep. No. 104-23, at 17 (1995) ("the provisions of this bill shall not be construed to grant immunity from any future action against any entity referred to in the bill"); 142 Cong. Rec. H1,145 (Feb. 1, 1996) (Rep. Conyers) ("by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers"); President's Statement Upon Signing the 1996 Act, *reprinted in* 1996 U.S.C.C.A.N. 228-1, 228-3 (Feb. 12, 1996) (savings clause "ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemakings or orders, the antitrust laws continue to apply fully").

practical impossibility and violation of antitrust standards for a court to attempt to decide a monopolization claim as if the 1996 Act did not exist. As was stated by then-Judge Kennedy, "'the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.'" *Phonetele*, 664 F.2d at 742-43 (quoting 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 223d (1978)); see *id.* ("[t]he impact of regulation on pricing and other competitive factors is too obvious to be ignored"). Here, as explained above, *supra* at 20-21, these effects of regulation mean that denials of access to local areas unequivocally prevent competition on the merits and that the imposition of antitrust liability could not chill procompetitive conduct, lead to collusion, or present administrative problems.

Third, DOJ and Verizon are proposing a construction of the savings clause in which it would create the very antitrust immunity that it was the object of the savings clause to prevent. The savings clause provides that "nothing" in the Act (including, therefore, the savings clause) shall be construed to limit the applicability of the antitrust laws. But DOJ and Verizon are proposing a construction of the savings clause which bars antitrust liabilities that would be imposed if there were no savings clause. A statute may not be construed to "'destroy itself.'" *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998) (citation omitted).

III. THE "UNADORNED" ANTITRUST LAWS DO NOT LEGITIMIZE ALL REFUSALS TO DEAL THAT MAXIMIZE SHORT-RUN PROFITS.

Finally, DOJ's and Verizon's claims also rest on misstatements of the meaning of the "unadorned" antitrust standards that purportedly would apply if the duties imposed by the 1996 Act could be ignored. In particular, they contend that claims of refusals to deal (like predatory pricing claims) are or should be exceptions to the standards that generally govern determinations of whether monopolies have been acquired or maintained through illegitimate means. In

particular, in their view, refusals to deal are *per se* lawful unless they sacrifice short-run profits. DOJ Br. 15-20; Verizon Br. 17-23. DOJ and Verizon further contend that there is no reason to inquire into whether such "'sacrifice'" has occurred unless the incumbent has "voluntarily" provided non-rivals the same thing that it denies rivals on the same terms and conditions. DOJ Br. 14-15, 23-25 nn.8-11; Verizon Br. 19-20.

These claims are quite clearly wrong. Although sacrifices of short-run profits (and discrimination against rivals) certainly represent conditions in which refusals to deal can be found exclusionary and predatory, this Court has never held that these are the *only* conditions in which refusals to deal can be condemned under the antitrust laws. And there is no basis for such a categorical rule in economic or antitrust policy. Moreover, the distinctions that DOJ and Verizon would draw are – as the facts of this case illustrate – wholly irrational and would produce arbitrary distinctions among conduct having identical purposes and effects.

1. The Court's decisions squarely reject the rule that DOJ proposes. In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), the Court invalidated a refusal to deal that maximized the defendant's profits in the short term as well as the long term, and the utility unsuccessfully defended its conduct on that basis. Specifically, the Court upheld the district court's finding that Otter Tail had violated § 2 when it violated regulatory requirements that obligated it to "wheel" (at wholesale) power for municipalities that were attempting to compete with Otter Tail in retail markets. In so holding, the Court necessarily rejected the notion that exclusionary conduct can only be found if there has been "sacrifice." Under DOJ's theory, the Court would have been required to reverse the district court on the grounds that Otter Tail clearly had a "business justification" for its refusal to deal – preservation of retail monopoly profits.

In *Aspen Skiing*, the Court likewise did not apply a "sacrifice of short term" profits test, but instead asked whether Ski Co.'s conduct had "'unnecessarily'" impaired competition. *Aspen Skiing*, 472 U.S. at 605 n.32. Contrary to Verizon's (Br. 18) and DOJ's (Br. 19) assertions, Ski Co.'s antitrust violation was its refusal to market the 4-area, 6-day *discounted* ticket (with revenues divided by usage) which skiers preferred. The antitrust violation was not Ski Co.'s refusal to sell tickets to Highlands at full retail price, which was merely evidence of Ski Co.'s intent in eliminating the discounted 4-area tickets. 472 U.S. at 608. In this regard, the evidence was that Ski Co.'s share of industry revenues increased each ski season after it discontinued the 4-area ticket. *Id.* at 594-95; see 3A *Antitrust Law* ¶ 772 at 185 n.35 (Ski Co.'s "business calculation was doubtless that its short-run revenues during the current season would be higher with a three-area ticket than with a four-area ticket"). Critical to the finding of antitrust liability was that the "optimal" method of distribution was the 4-area ticket (472 U.S. at 604 n.31 & 605-7) and that, in Judge Posner's words, this is a market in which "cooperation is indispensable to effective competition." *Olympia*, 797 F.2d at 379.

2. Nor is there any economic basis for adoption of a sacrifice test in this context. As advanced by DOJ, the purpose of the sacrifice test is to shield from antitrust scrutiny conduct that is profit maximizing (apart from lessening competition) because such business conduct is ordinarily in the public interest. DOJ Br. 17. The sacrifice test arose in predatory pricing cases, where it has been recognized that price reductions are presumptively beneficial to consumers in all markets and that there is a substantial risk that misapplication of the antitrust laws could deter procompetitive behavior. See, *e.g.*, *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

Refusals to deal, on the other hand, present a vast array of widely varying conditions, and there is no reason or basis to

impose *per se* rules of legality – or even presumptions of legality – based upon the presence or absence of short-term sacrifice. This is particularly true where, as here, the refusal to deal is by an incumbent monopolist that controls natural monopoly facilities that cannot be replicated by new entrants, a context in which the incumbent may be able to charge supracompetitive rates *without* attracting entry. See, *e.g.*, William J. Baumol et al., *Contestable Markets and Industry Structure* 290-303 (1982).

And when, as here, the conduct occurs in a context in which laws extrinsic to the antitrust laws require dealing at non-monopoly rates in order to open markets to competition and reduce prices to consumers, there is no possible basis for an irrebuttable presumption that a refusal to deal is lawful whenever short-term profits are maximized. See Areeda, *supra* at 19 n.14, at 848 n.34 ("a duty to deal" will here "benefit customers"). To the contrary, as the nation's leading antitrust scholars have found, the fact that the incumbent has incentives to violate such regulation in order to maximize short-term (and long-term) profits presumptively establishes the illegitimacy of its conduct under the antitrust laws, *not* its lawfulness. See Areeda Op. 3; Bork Op. 4-6; Sullivan Op. 11-13; *supra* at 12 n.11.

3. Finally, DOJ's and Verizon's distinction between "affirmative" and "negative" duties would produce results that are irrational and that advance no plausible economic or antitrust theory. Specifically, DOJ and Verizon maintain that violations of "affirmative" duties to share essential facilities are lawful unless they reflect a short-run profit sacrifice. DOJ Br. 19-20; Verizon Br. 22. By contrast, they claim violations of "negative" duties are assessed under the normal § 2 standard in which conduct that maintains a monopoly is unlawful if it "'either does not further competition on the merits or does so in an *unnecessarily* restrictive way'" and in which the question is whether the "harm to competition" is "disproportionate to consumer benefits" and "to the economic

benefits to the defendants (aside from benefits that accrue from diminished competition)." DOJ Br. 14.

Preliminarily, this approach would present immense practical problems. Here, because of their incentives to do whatever possible to delay and frustrate the access required by the 1996 Act, ILECs have engaged in courses of conduct that include violations of "negative" duties (sham litigation, intentional misrepresentations, and acts of sabotage), violations of affirmative duties (outright denials of access), and conduct that cannot be readily characterized as one or the other (bad faith conduct in negotiation or implementation of interconnection agreement).

Even assuming that antitrust courts could, in practice, readily distinguish "negative" duties from "affirmative" ones, DOJ's proposed rule would immunize from antitrust liability conduct that is economically indistinguishable from conduct that would create liability. DOJ acknowledges that an ILEC would be guilty of monopolization if it delayed the provision of access to essential facilities by violating negative duties: *e.g.*, by engaging in sham litigation and making bad faith claims to a state commission that the provision of access to the particular facility is not technically feasible. DOJ Br. 14 n.4 (citing *Trucking Unlimited*, 404 U.S. 508); compare *Litton*, 700 F.2d 785 (2d Cir. 1983) (advocacy of PCA requirement was sham litigation). Under DOJ's approach, this conduct would be unlawful even though it maximized the incumbent's short-run profits (by preventing competitors from supplanting high margin retail services), because the conduct violates "negative" duties extrinsic to the antitrust laws (abuse of process) and any benefits are disproportionate to competitive harm.

But an entirely different standard – absolute immunity – would apply if the incumbent engaged in what can be characterized as a refusal to deal and violation of an "affirmative" duty. For example, suppose an incumbent unilaterally refused to provide access to the facility in

violation of an explicit FCC order that it do so. Compare *MCI*, 708 F.2d 1081 (7th Cir. 1983) (access denied in violation of prior FCC order). In this context, DOJ would treat the fact that the conduct maximized profits as irrefutably establishing that the conduct has a legitimate business purpose and cannot constitute monopolization. Thus, DOJ would treat differently conduct that is identical in effect and purpose based on an (arbitrary) determination whether the conduct is considered a violation of a "negative" or an "affirmative" duty.

DOJ's test would produce remarkably irrational results, for the *greater* the consumer benefit that would result from sharing, the *lesser* the likelihood that the access denials would be found unlawful. Here, of course, FCC regulations seek to promote local competition by requiring incumbents to grant competitors access at cost-based rates to monopoly facilities. Those access regulations deny the incumbents profits they might have earned by using the same facilities to provide their own retail services. The calculus under the sacrifice test therefore would turn on whether the net benefit from denying the access (retail revenues preserved minus fines imposed for access violations) would exceed the revenues from access and interconnection (the cost-based rates paid by the CLEC). Perversely, the greater the investment that the CLEC had made in alternatives to incumbent facilities (and thus the lesser the leasing revenues the incumbent would forego by denying access), the clearer it would be that the short-term sacrifice test would be met.

For example, if a CLEC had built an entire alternative network (loops, switches, and transport), the CLEC would provide the maximum possible investment in "unshared facilities" and, in Verizon's and DOJ's view, the maximum competitive benefit. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 413-44 (1999) (Breyer, J., concurring). But in that event, the CLEC would lease no network elements and the incumbent would forego only incidental revenues (from

"trunks" to interconnect the two networks) in denying access. Thus, there would almost certainly be a net gain in short-run profits from denying the rival's interconnection request.

In contrast, the likelihood that the revenues from access (less fines) would offset the incumbent's retail revenues would be much greater if the CLEC leased loops, much greater still if it leased combinations of loops, switching, and transport at TELRIC rates, and at its greatest when the CLEC buys wholesale services for resale under § 251(c)(4) (under a pricing standard that preserves the incumbent's net revenues). This is precisely the opposite of what any rational application of antitrust principles should produce.

This underscores that DOJ has been seduced by abstract labels and has urged a position that makes no economic or legal sense. Where an incumbent acquires or maintains its monopolies by willfully violating regulations designed to make competition possible and to allow consumers to receive lower priced services, that conduct, whether it reflects sacrifice or not, epitomizes conditions in which the incumbent has excluded rivals for reasons having nothing to do with efficiency and in which the incumbent's conduct is "exclusionary," "predatory," and justified by no legitimate business purpose.

CONCLUSION

If the case is not dismissed for lack of standing or as improvidently granted, the judgment of the Second Circuit should be affirmed.

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Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ECONOMICS PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party or any other entity authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *Amici* state that the parties have granted blanket consent to the filing of briefs by *Amici* supporting either party.

Robert D. Willig is Professor of Economics and Public Affairs at the Woodrow Wilson School and the Economics Department of Princeton University. Professor Willig was Deputy Assistant Attorney General for Economics in the Antitrust Division of the DOJ from 1989 to 1991. He has taught advanced courses on industrial economics and the economics of antitrust issues and written a number of articles on this and related topics.

The qualifications of *Amici*, the positions that they hold and have held, and the scholarly honors and distinctions that they have earned, are listed in greater detail in Appendix A to this brief.

Amici have a strong interest in this case. They have written extensively about industrial organization, the field of economics that is concerned with competition among business firms and upon which "antitrust economics" is founded. In particular, *Amici* have, in scholarly articles and in submissions to courts, written widely on the proper economic analysis to apply to business conduct that is challenged as predatory or exclusionary behavior that constitutes "willful" monopolization under section 2 of the Sherman Act. Professors Ordover and Willig are widely credited with developing the "sacrifice" test that was also independently formulated and applied about the same time by Professor Baumol in assessing claims that conduct challenged as exclusionary, in fact, reflected "legitimate business practices." This is the criterion the Department of Justice and Federal Trade Commission (collectively "the Government") urge the Court to adopt as an absolute prerequisite for a finding that a refusal to deal, whatever the particular market or regulatory conditions, amounts to "willful acquisition or maintenance" of monopoly power.

The purpose of this submission is to show that the sacrifice test for assessing claims that business practices are exclusionary, while a powerful analytic weapon in helping to

determine whether some course of conduct is or is not anticompetitive, is not always definitive, as the Government maintains. Depending on the issue and the pertinent circumstances, a course of conduct that passes this test may nevertheless be anticompetitive and consequently in violation of the antitrust laws. In circumstances, such as those at issue here, where a presumption can be established that passage of the test fails to demonstrate conclusively and automatically that the conduct at issue was not anticompetitive, then only by consideration and evaluation of material issues of fact at a trial can one legitimately determine whether the actions at issue are or are not willfully anticompetitive. At issue here is a particular and important instance in which undertakings that pass the sacrifice test and therefore may appear to be legitimate business acts, nevertheless may not be so and may well be in violation of the antitrust laws. That is because the acts at issue are alleged to contravene what a qualified governmental agency has determined to be a requirement of law for the purpose of fostering effective competition in the relevant market. It must be recognized that actions that flout such regulatory decisions may plausibly constitute a willful measure undertaken to attain or preserve monopoly power in the market, and that the validity of this conclusion can only be tested with the aid of the pertinent facts.

SUMMARY OF ARGUMENT

The courts and legal and economic scholars have long struggled to formulate economically defensible and judicially workable standards for determining whether business conduct that has been attacked under the antitrust laws is predatory or exclusionary. This is a vexing problem, because of the close resemblance between vigorous competitive activities that the law appropriately is designed to encourage in order to promote the public interest, and activities that are anticompetitive and hence damaging to the public welfare. The difficulty of distinguishing these two types of behavior

stems from the fact that they both are disadvantageous to rivals. A firm would always be better off if the vigor of a rival's legitimate competitive efforts were to diminish, but this is also true of predatory or exclusionary conduct. Added to this is the analytic difficulty resulting from the myriad forms that business conduct can take, and the fact that conduct that is anticompetitive in one context may be procompetitive in another. See *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (citing 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 813, at 300-02 (1978)). The challenge for antitrust courts is, and always has been, to apply standards that deter anticompetitive behavior without undermining incentives for procompetitive pricing, production, investment and innovation (and without unduly taxing scarce judicial resources). As in all such complex endeavors, scholars and decision-makers search (usually in vain) for the simple, unified standard that can be employed to reach the right result in every case. Unfortunately, there is, as yet, no such universal economic litmus test for the identification of anticompetitive business conduct in all circumstances.

Amici are, however, in broad agreement with the Government that "sacrifice" – *i.e.*, a choice of a business strategy that would be contrary to interest or unprofitable to the firm that undertakes it without the additional monopoly power resulting from the exit or disabling of rivals it is likely to cause – is a powerful tool that can help materially in assessment of claims that some business conduct violates section 2 of the Sherman Act. Where, for example, a court can be confident, on the basis of the evidence, that the challenged conduct entails such sacrifice, the conduct generally should be presumed to be predatory or exclusionary (and if the plaintiff has met its burden of proving the other elements of monopolization, a violation of section 2). As *Amici* Professors Ordover and Willig demonstrated in their 1981 Yale Law Journal article that first provided specific

sacrifice-based tests to distinguish between predatory and procompetitive conduct, a business practice that *only* makes sense because it causes rivals to exit or to lose their competitive force, and thereby significantly increases the firm's power over price is almost certainly anticompetitive, harmful to consumers, and hence does not constitute a legitimate business practice. This is so because the finding that the practice would not make business sense absent the additional monopoly power it provides generally reveals that the business practice is antitcompetitive, and would not be undertaken by a rational firm management unless it can be expected to reduce competition in the market. In economic terms, the consequences must be economic inefficiency, for the action must generate more in economic costs than in consumer benefits and lawful concomitant business benefits. In sum, the practice could be presumed to diminish social welfare by lessening competition and by increasing monopoly power. See Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 Yale L.J. 8, 9-10 (1981) (hereinafter "Ordover & Willig, *Economic Predation*").

Amici likewise agree with the Government that conduct that does not involve sacrifice should not, *in most cases*, be condemned as exclusionary or predatory. In this regard, the underpinning of the sacrifice test is the common sense notion that the antitrust laws should not penalize profit-driven behavior undertaken in the ordinary course of business, because such conduct is presumptively – although not always – legitimate business conduct without antitcompetitive consequences. That understanding, combined with the practical difficulties courts necessarily encounter in determining when profit-driven behavior is anticompetitive, together with the potential exploitation of such difficulties by less efficient rivals seeking to accomplish with litigation what their inefficiency made impossible in the market, should

engender skepticism towards claims of willful acquisition or maintenance of monopoly power in the absence of sacrifice.

After all, the absence of sacrifice usually indicates that the conduct is profitable for ordinary business reasons. Of course, such conduct may sometimes endanger the viability of a rival by offering consumers attractive prices based on low costs or innovative service or product designs that leave a less capable rival with insufficient demand to remain in the market and exercise full competitive vigor. Although such conduct may cause the rival to exit, and therefore even result in additional monopoly power, the conduct offers direct benefit to consumers, and is the kind of conduct that is characteristic of socially beneficial competition.

Moreover, there are generally – but not always – dangers to the competitive process that result from use of antitrust laws to attack conduct that is characteristic of competition, even where that conduct has had the incidental effect of enhancing monopoly power. It is these dangers that are generally controlled by the sacrifice test for willfulness, with the *proviso* that the prospect of the additional monopoly power must be shown to have been necessary for the conduct to have been in the business interest of the firm accused of monopolization.

The "not always" qualification is, however, a very important one, because there undeniably are circumstances where business conduct can be damaging to the public welfare even though it passes the sacrifice test. In particular, and especially relevant here, there are cases in which such conduct can be shown to be anticompetitive despite the apparently contrary indication of the sacrifice test. This possibility is evidently present where the conduct in question is characterized as an unlawful impediment to competition by regulations promulgated by an appropriate government agency.

Amici therefore part ways with the Government in its attempt to give the sacrifice test a broader role than it can legitimately bear. In particular, *Amici* strongly disagree with the Government's suggestion that it would make sound economic and public policy sense for the Court to mandate strict application of the sacrifice test in all cases challenging a monopolist's refusal to deal with a potential rival, regardless of the context of constraints and regulations bearing on the firm's marketplace conduct. The Government suggests that the Court should grant, regardless of context, a *conclusive*, across-the-board presumption of legitimacy to entry-deterring or exit-inducing business conduct whenever the defendant's existing profits exceed the profits the defendant would earn if it did not refuse to deal with rivals. That would be a serious misapplication of the sacrifice test and, if adopted, could have far-ranging and detrimental consequences for consumers in particular and for competition more generally.

As noted, the sacrifice test is intended to protect ordinary business conduct, even that of an alleged monopolist, because profit-driven conduct by firms (apart from conduct that is only profit-maximizing because it harms competition) can, in most circumstances, be expected to promote overall social welfare. But where Congress, an administrative agency or a state government has declared certain conduct to be *unlawful*, that determination cannot simply be disregarded for antitrust purposes. Where a firm violates a legal requirement, even if it is thereby seeking to enhance profits in a manner that does not depend on the exit of competitors, the rationale that underlies the sacrifice test – that such behavior is not anticompetitive and is conducive to the public welfare – evaporates.

It is easy to show that even outside the antitrust context it may be possible for an act to promise long-run profitability without driving out rivals or preventing entry, and yet for that act not to constitute a legitimate business practice. That is,

such an act, despite passing the sacrifice test, may be damaging to economic efficiency and the general welfare. The following hypothetical example makes this clear:

> Firm A, along with other firms, supplies product X, a popular junk food that causes cancer 20 years after protracted consumption. Firm A knows this but engages in false advertising that conceals that danger and claims, convincingly, but falsely, that X actually has beneficial health effects. The false claim greatly increases market demand, benefiting Firm A, along with all of its competitors and even leads to entry. Total profit of each incumbent increases, though price is driven down closer to pertinent costs. Clearly, profits have risen and competitiveness has also increased, but consumer welfare has been damaged. This is presumably illegal and fraudulent behavior (in terms of false advertising, for example), though it is not an antitrust matter. Damage to consumer welfare is the right criterion for rejection of such an act as a legitimate business practice, but the practice may not by itself constitute an antitrust violation.

But similar problems can also beset the use of the sacrifice test for conduct like that at issue in the case at hand. Such conduct can pass the sacrifice test and yet entail business behavior that is not only illegitimate but that is also anticompetitive. In some markets, regulators have mandated that incumbents provide rivals access to their facilities in order to facilitate competition that would otherwise be unlikely to develop because the incumbents control natural monopoly facilities that cannot be economically duplicated by rivals. Even if denial of, or erection of barriers to, such access may not literally destroy any competitors and yet add to the local carrier's long term profits, such conduct has two features that make it critically relevant to antitrust litigation.

First, the erection of handicaps to access to incumbent facilities impedes achievement of the arrangements that have been mandated by the pertinent authorities as a step unavoidably required in order to introduce effective competitiveness into the arena. Second, even if such barriers to access drive no firm from the market, they may achieve their promised profitability to the incumbent firms if the barriers significantly impede the ability of potential rivals to compete. Thus the acts at issue require at least reexamination of the facts to determine whether (a) they were illegitimate business practice, and (b) they are anticompetitive as well, even if they do not literally destroy any rivals.

The conclusion that follows is that where the extrinsic legal requirements that have been violated are specifically intended to promote competition and prevent the exercise of market power, there can be no plausible implication that the profit-driven conduct is in the public interest. In such circumstances, the general presumption in favor of conduct motivated by the ordinary pursuit of profits (apart from those resulting from additional monopoly power) has been expressly disavowed by the legal requirements. This is common in industries that are subject to regulation because they frequently are characterized by natural monopoly contributed by the indivisible character of the requisite infrastructure. It is a valid conclusion of economics that explicit regulatory rules are appropriate as a means to constrain and suitably modify the incentives for the pursuit of profits in such industries.

Here, absolute reliance on the sacrifice test of willfulness as an indicator of the legitimacy of a particular business practice makes no sense, because there can be no automatic presumption that the ordinary pursuit of profits is consistent with the maintenance or promotion of competitiveness and social welfare. Indeed, where irrespective of the outcome of the sacrifice test, a monopolist flouts regulatory requirements

expressly designed to enable competition, this should be considered direct and powerful evidence of "willful" conduct that is not deserving of protection under the antitrust laws. Accordingly, in such circumstances, profit sacrifice cannot, consistently with valid economics, be the *sole* test for willfulness. Rather, in such circumstances, antitrust plaintiffs should, as a matter of antitrust economics, be provided an opportunity to prove that the monopolist's behavior, although seemingly consistent with the pursuit of legitimate profit objectives, is nonetheless anticompetitive and a source of economic inefficiency.

Amici do not mean to suggest that antitrust courts should, even where regulatory requirements have been flouted, lightly or uncritically accept allegations that profit-driven behavior reflects the willful acquisition or maintenance of monopoly power. To the contrary, a fair dose of skepticism (both at the summary judgment stage and later) seems to us appropriate even in this context. And the defendant, like all section 2 defendants, should retain the opportunity to prove substantial and legitimate business justifications for its refusal to deal (apart from the sacrifice test-based justification that the conduct must be *presumed* legitimate merely because it is profit-driven). But the Government's proposed rule, which would in all cases bar plaintiffs from even *attempting* to demonstrate that the challenged profit-driven behavior constitutes the willful acquisition or maintenance of monopoly power, can shield undeniably willful anticompetitive conduct from the reach of the antitrust laws.

For these reasons, dismissal of Respondent's section 2 claim on the ground that Respondent failed sufficiently to allege sacrifice would clearly be inappropriate. It is well recognized that local telephone facilities and services are monopolized by incumbent telephone carriers such as Verizon and that, despite regulation, prevailing retail rates are often supracompetitive. In the Telecommunications Act of

1996, Congress attempted to open these closed local markets to competition. Congress recognized, however, that the incumbents control bottleneck facilities that are essential to competition and can therefore profitably maintain monopoly prices without attracting entry, even if such entry were permitted. That is why Congress mandated that incumbent local exchange carriers provide competitors with access to their last mile facilities on regulated terms and conditions. *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 477-91 (2002). Here, then, there can be no economically justifiable presumption for condoning a refusal to deal by Verizon solely because access would lower profits relative to the profits Verizon earns by refusing to deal. In this context, there can be no legitimate presumption that the refusal to deal is pro-competitive or that intervention that affects unilateral firm conduct would, over a wide range of cases, in any way impede vigorous competition.

In sum, in cases such as this one there is simply no valid economic justification for limiting the "willfulness" inquiry to the investigation of profit sacrifice. On the contrary, unduly strict application of the sacrifice test, as urged by the Government, would immunize from antitrust scrutiny behavior that, while arguably (but not yet demonstrated by Verizon to be) profit-driven for the monopolist, has been deemed by Congress to be – and is – anticompetitive and harmful to consumers. Accordingly, Respondent should be permitted to proceed to discovery and given a chance to prove with direct and objective evidence the allegations in the Complaint that Verizon has engaged in "willful" monopoly maintenance.

ARGUMENT

The Government urges the Court to use this case to establish a new, strict standard for determining whether a regulated monopolist that refuses to deal with a rival has engaged in conduct that violates section 2 of the Sherman

Act. Although section 2 does not prohibit "monopoly in the concrete," *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 62 (1911), it does condemn "monopolization." Monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Determining whether conduct amounts to the "willful acquisition or maintenance" of monopoly power is often quite difficult. As the D.C. Circuit recently observed:

> [w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in the stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.

United States v. *Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir.) (en banc), *cert. denied*, 534 U.S. 952 (2001).

The Government endorses a "sacrifice" test for determining whether conduct should be considered "willful," – *i.e.*, aimed at acquisition or preservation of monopoly power. The Government explains that "conduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." Gov't Br. at 15. From this perspective, then, "sacrifice" entails a choice of a business strategy that would make no business sense outside of the probability that the conduct would create or maintain monopoly power. *Id.* (conduct is "willful" within the meaning of section 2 when it

is not profitable "but for its tendency to eliminate or lessen competition").

Although the Government does not cite the scholarship of *Amici*, the test that it advances was developed in a series of articles *Amici* published over the past two decades.[2] Most notably, in their often-cited 1981 Yale Law Journal article, Professors Ordover and Willig posited that "predatory behavior is a response to a rival that sacrifices part of the profit that could be earned under competitive circumstances, were the rival to remain viable, in order to induce exit and gain consequent additional monopoly profits." Ordover & Willig, *Economic Predation* at 9-10 (footnotes omitted).

Amici have no quarrel with the Government that the sacrifice test is a powerful tool for assessing willfulness. *Amici* also agree with the Government that, in many market circumstances, the sacrifice test of willfulness is generally, but not always, conducive to economic efficiency. Ordinarily, so long as the conduct in question makes business sense apart from any impact on competition, profit-seeking behavior by individual firms ought to be protected from intrusive, costly, and unpredictable scrutiny by the courts in response to complaints by rivals who may latch on to antitrust

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[2] *See generally* Ordover & Willig, *Economic Predation*; Janusz A. Ordover et al., *Predatory Systems Rivalry: A Reply*, 83 Colum. L. Rev. 1150 (1983); Janusz A. Ordover et al., *Nonprice Anticompetitive Behavior by Dominant Firms toward Producers of Complementary Products, in Antitrust and Regulation* 115-30 (F. Fisher ed., 1985); William J. Baumol, *Predation and the Logic of the Average Variable Cost Test*, 39 J.L. & Econ. 49 (1996); Janusz A. Ordover & Robert D. Willig, *Access and Bundling in High-Technology Markets, in Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace* 103-28 (Eisenach and Lenard eds., 1999).

as a means of subverting competition.[3] Unimpeded pursuit of profits – when constrained by effective present (or future) competition – will usually lead a firm to innovate and to offer consumers products they desire at attractive prices and is thus a pro-competitive means of gaining and maintaining market position. This is generally so even if the result of such activity is exit or reduction in the competitive prowess of other firms. However, when it is the latter effects, and the attendant diminution in competition, that is the only objective explanation for the firm's choice of market behavior, such unimpeded pursuit of profits cannot be considered conducive to overall consumer welfare.

As the Government recognizes, Gov't Br. at 16, the presumption that profit-driven behavior is pro-competitive has been utilized most widely in the context of so-called "predatory pricing." Low prices, of course, can ordinarily be expected to benefit consumers significantly and the courts are understandably reluctant to impose antitrust liability for price reductions lest they "chill the very conduct that antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). This Court in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993), held that a plaintiff can prevail on an allegation that a defendant has engaged in predatory pricing only if it can show that the defendant's prices represent a short-term sacrifice intended to gain long-term monopoly profits. *Brooke* therefore establishes that, in the predatory pricing context, conduct should be considered exclusionary only where there is clear evidence of sacrifice accompanied by equally clear evidence that the market is

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[3] *See* William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247 (1985).

susceptible to monopolization (which underlies the "recoupment" element of the predation test).

Under ordinary market circumstances, sacrifice can also provide pertinent information to the willfulness inquiry in cases involving allegations of refusals to deal or refusals to provide access to "essential facilities."[4] *Amici* agree with the Government that, as a matter of economics, the duty of a business – even of a business with monopoly power – to deal with rivals should be circumscribed. *Amici* likewise agree that where exclusionary conduct that contributes significant monopoly power is shown to entail sacrifice, a duty to deal generally should be implied. Here, a profit-maximizing monopolist would plainly be engaged in sacrifice if it refused to provide access to a needed facility at prices that yield a defensible margin above both the incremental cost of providing access (*i.e.*, the value of the inputs consumed in the process) and the properly assessed "opportunity cost" that the monopolist incurs when a competitor (rather than the monopolist itself) uses the input to provide service.[5]

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[4] *Amici* use the term "essential facility" here to mean facilities that have strong natural monopoly characteristics and cannot be economically duplicated even where the incumbent were to charge an unconstrained monopoly price for access to the essential facility. William J. Baumol et al., *Contestable Markets and Industry Structure* 290-303 (1982); Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 634 (3d ed. 2000).

[5] *See, e.g.*, Robert D. Willig, *The Theory of Network Access Pricing, in Issues in Public Utility Regulation* 109-52 (Trebing ed., 1979); Ordover & Willig, *Economic Predation*; William J. Baumol & J. Gregory Sidak, *Toward Competition in Local Telephony* 93-116 (1994); Jean Jacques Laffont & Jean Tirole, *Competition In Telecommunications* 97-178 (2000).

It does *not* follow, however, that willful exclusionary conduct occurs *only* when there is such a sacrifice of the sort described above. *Amici* strongly disagree with the Government's request that the Court adopt the sacrifice test as the *sole* basis for determining willfulness in all section 2 refusal-to-deal cases. See, *e.g.*, Govt. Br. at 17 ("a refusal to aid rivals that makes economic or business sense *apart* from a tendency to impair competition is not exclusionary"). If adopted, the Government's test could immunize from antitrust scrutiny a wide range of conduct that can only be viewed as reducing overall consumer welfare.

To understand why this is so, it is essential to consider the analytical underpinnings of the sacrifice test. In their writings, *Amici* have made clear that the sacrifice test is designed to protect business conduct undertaken in the ordinary course that is motivated by pursuit of long-run profits, because such conduct presumptively – *but not necessarily* – promotes overall social welfare. As already discussed, under ordinary market circumstances, the presumption is a powerful one. Market behavior, driven by the profit motive (apart from the profits resulting from additional monopoly power), generally does produce socially desirable outcomes. And, given endemic limitations of information, courts are as likely to do harm (by unintentionally deterring procompetitive conduct) as good (deterring anticompetitive conduct) in attempts to draw lines other than those suggested by the sacrifice test. See *generally* William J. Baumol, *The Free-Market Innovation Machine* (2002); Robert H. Bork, *The Antitrust Paradox* (1978). But there are exceptions – in particular, where constraints and regulations in addition to the market influences of the pursuit of profits shape business behavior – and, for that reason, there possibly exist reliable objective evidence of willfulness even in the absence of demonstrated sacrifice. For these reasons, the sacrifice test was never intended to be *the* sole test for willfulness in this type of economic setting, see, *e.g.*, Ordover

& Willig, *Economic Predation* at 9-10 & n.8, although alternative evidentiary tests should also focus on objective analyses of market conduct and eschew interpretation of the articulations of business personnel.

As explained in greater detail below, a local telephone monopolist's refusal to deal with a potential rival provides a clear example of the limits of the power of the "sacrifice" test. Strict application of the sacrifice test would gauge the profitability of the examined conduct against the benchmark of existing price and industry structures: interpreted in this way, the local telephone monopolist does not incur a "sacrifice" by refusing to grant a competitor wholesale access to its network if the price offered by the rival generates less profits to the monopolist than selling to the rival's prospective customers at retail (and excluding the rival). The sacrifice test's illuminative power rests legitimately on the presumption that in *ordinary* market conditions, profit-driven conduct that merely preserves existing market pricing structures is unobjectionable. In contrast, where, as in the local telephone context, the base-level pricing structures and refusals to deal have been explicitly *repudiated* as anticompetitive by legislation designed to foster competition, such a presumption is plainly inappropriate.

It is also important to recognize that in the special context in which competition-forcing regulatory requirements have been breached, there is far less concern that the antitrust court will erroneously condemn conduct that is unambiguously pro-competitive (or that less efficient rivals will be able to subvert the antitrust laws to further their own business objectives). That is because a defendant will have breached the regulatory requirement (and thereby lost the advantage of the presumption that any profit-driven refusal to deal is pro-competitive) *only* if the defendant refuses to deal at a price that has already been determined by regulators (and this Court as well, in the case of the rules that govern the pricing of

access to local telephone facilities) to be compensatory and competition-enhancing. See *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002).

Put more broadly, where Congress has held certain behavior to be unlawful, it can no longer be presumed that such behavior, simply because it would be deemed perfectly lawful, *i.e.*, free of "sacrifice," in another market setting, is economically efficient in the context at issue, irrespective of the likelihood that it will reduce or eliminate competition. On the contrary, where conduct violates a law, even one extrinsic to the antitrust laws, this suggests that there has been an express legislative determination that the conduct affirmatively harms consumer welfare and should not be shielded from antitrust scrutiny. At a minimum, when a firm engages in profit driven, but illegal conduct, the ordinary presumption that the firm's behavior is promoting the social welfare can no longer be maintained.

This common sense (and economically unassailable) notion is well established in antitrust jurisprudence. "[W]here conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find that conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws." 1 ABA Section on Antitrust, *Antitrust Law Developments* 249 (5th ed. 2002). Indeed, this Court has repeatedly applied this principle to condemn conduct that would otherwise not appear to constitute "sacrifice" within the Government's strict definition of the term. See, *e.g.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377-79 (1973) (upholding district court's finding that Otter Tail had acted willfully when, in violation of applicable regulatory requirements, it refused to "wheel" (at wholesale) power for municipalities that were attempting to compete with Otter Tail in retail markets); *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 173 (1965) (holding that "maintenance and enforcement of a

patent obtained by fraud . . . . may be the basis of an action under § 2 of the Sherman Act"). Although the Government states without explanation that this body of case law is "not implicated here," Gov't Br. at 12 n.3, it is, for the reasons described above, highly relevant to any reasoned section 2 analysis.

As a matter of logic, it is implausible that an antitrust court can rationally assess whether conduct makes "business sense" *without* reference to the legal context of that conduct. Conduct that might make business sense under a particular legal and regulatory regime might not under another set of requirements. Returning to an earlier example, absent legal constraints on fraud or false advertising, it may be "profit maximizing" for a business to misrepresent to consumers the quality of its services even apart from any impact those misrepresentations may have on overall competition. But where such representations can subject the firm to substantial civil penalties or other legal sanctions, such conduct is unlikely to make "business sense" in any meaningful interpretation of that concept.[6]

And where, as here, the extrinsic law in question is one that is specifically intended affirmatively to *promote* competition in natural monopoly industries,[7] the "willfulness" test must

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[6] In this regard, *Amici* note that Respondent has alleged that Verizon's refusal to deal was not supported by a legitimate business justification because Verizon incurred millions of dollars in fines as a result. *See* Amended Complaint ¶ 22.

[7] Specifically, the traditional response by regulators to the problem of natural monopoly industries was to grant them exclusive franchises while regulating the rates that they could charge for their services. *See, e.g.*, Stephen Breyer, *Regulation And Its Reform* 15-19 (1982); 1 Alfred Kahn, *The Economics of Regulation* 11-12 (1970). In this way, regulators sought

reflect this explicit repudiation of what otherwise might be a legitimate profit-maximizing monopoly conduct. Plainly, this overarching public interest is not captured in a test of profit sacrifice that is based on the regulated monopolist's current market position and profit levels. Where Congress explicitly forbids conduct on the grounds that it would prevent the very competition that Congress is affirmatively seeking to foster, there is no rational basis to presume (as the sacrifice test properly does in other contexts) that the current level of profit constitutes the appropriate benchmark with which to evaluate the incumbent's strategy for granting access. In other words, in regulated industries, inflexible utilization of a "sacrifice" test – at least as measured against a benchmark of monopoly profits resulting from flouting regulations designed to foster competition – is invalid as a matter of economics, because there can be no legitimate presumption that such unimpeded pursuit of profits is not anticompetitive and serves the public interest. Conversely, conduct that does not seem to entail a voluntary sacrifice may nevertheless constitute willful monopolization because the firm's conduct choices are

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to avoid potentially "wasteful" competition, while protecting consumers from monopoly rates. Increasingly, however, Congress and state governments have become dissatisfied with this traditional approach. As an alternative, they have sought to use regulation as a means of fostering *competition* that can protect consumer welfare and prevent the monopoly prices that would result from allowing the incumbent firms to engage in pure profit maximization. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323 (1998). Recognizing that incumbents that control natural monopoly facilities would have strong incentives to resist providing competitors access to those facilities on terms that could undercut monopoly profits, regulators have required incumbent monopolists to grant competitors "access" to their "'bottleneck'" facilities at regulated rates, terms and conditions. *Id.* at 1326.

inconsistent with regulations that have been expressly found necessary for protection of the public interest.[8]

In addition, where there is direct economic regulation of natural monopoly industries, the usual concern that antitrust courts will erroneously condemn pro-competitive conduct are substantially contained. In such cases, the terms and conditions of the access that are necessary to induce the desired competition, while protecting the legitimate interests of the incumbent, will already have been determined by the expert regulator and so the antitrust court need not arrive on its own at a view of the "optimal" terms for procompetitive access. See Phillip Areeda, *Essential Facilities*, 58 Antitrust L.J. 841, 853 (1990) (antitrust remedies appropriate when "as in *Otter Tail*, a regulatory agency already exists to control the terms of dealing"). In short, where the terms of access are regulated by an expert agency, the risks of misapplication of the antitrust laws are greatly diminished.

The Government misses these critical points in stating that a deviation from a rule that ordinarily does not make actionable the "monopolist's refusal to sell his goods or services below the monopoly price" would be improper because "the contrary rule would not merely require the monopolist to share its facility[,] [i]t would, in effect require the monopolist to share its profits." Gov't Br. at 23. The activities of Verizon at issue here are alleged to violate provisions of the Telecommunications Act of 1996 that were patently adopted to open to competition the monopoly local

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[8] Put another way, the appropriate benchmark for assessment of sacrifice in this context is not the existing pricing scheme that has been explicitly repudiated but the market prices that would have been established under competitive circumstances, but which, of course, have never developed.

telephone markets such as those of Verizon. Congress recognized that incumbent local telephone carriers' control of bottleneck local facilities provided them with an "almost insurmountable competitive advantage" over potential competitors and, in order to make effective competition possible and to enhance public welfare, *Verizon*, 535 U.S. at 490, Congress required incumbent carriers to deal with competitors on regulated terms and conditions, *id.* at 476-77 & 510 n.27 (the 1996 Act makes local competition "an end in itself" and gives "hundreds" of small entrants the ability to use "costly to duplicate" facilities). Undeviating adherence to the sacrifice test, as the Government advocates here, would shield from the antitrust laws conduct by Verizon that, in other situations might be entirely profitable even if it did not harm competition, but that Congress has expressly found to be anticompetitive and damaging to the public interest in the local telephone arena.[9]

The Government's claim that sacrifice must be the sole test of willfulness in all refusal-to-deal cases because if monopolists were required to deal with competitors that could result in "collusion" or depress innovation by entrants, Gov't

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[9] *Amici* question, however, how a court, at the motion to dismiss stage, could conclude that Respondent will be unable to establish that Verizon's refusal to deal entails profit sacrifice. It is hardly self-evident that provision of wholesale access at regulated rates would be less profitable on a per unit basis than use of the facilities to provide retail service at regulated rates. That can only be confirmed by analyzing the pertinent costs and revenues. Moreover, even if provision of wholesale access were less profitable on a per unit basis, it is not self-evident that retail competition and innovation facilitated by wholesale access would not stimulate demand and allow Verizon to make up the difference by selling more units, indicating that the "opportunity" cost of dealing with rivals may be lower than the incumbent claims.

Br. at 17, is also misplaced. Where an incumbent controls natural monopoly facilities that cannot be economically duplicated – such as the ubiquitous network of loops, switches and transport facilities controlled by Verizon[10] – there will be *no* entry and innovation by would-be competitors absent access to the incumbent's facilities.

Indeed, taken to its logical extreme, the Government's position would call into question the government's landmark antitrust suit to break up the Bell System. Under strict application of the sacrifice test, it is difficult to see how AT&T's refusal to grant MCI and other would-be long distance rivals "access" to its ubiquitous local networks could have been deemed "willful." AT&T would have argued that granting access to its competitors would have lowered its long distance profits and, therefore, by refusing to cooperate, it was not sacrificing its profits, even apart from the "lessening of competition." But that argument, like the Government's argument here, ignores the critical fact that AT&T's denial of

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[10] As this Court explained in *Verizon*:

> It is easy to see why a[n incumbent telephone carrier] would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long-distance calling as well. A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the "last mile" of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses.

Verizon, 535 U.S. at 490. The Federal Communications Commission has likewise found that, as a general matter, new entrant competitive carriers cannot economically replicate the local networks of incumbent carriers. *See generally Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, 15 FCC Rcd. 3696 (1999).

access was found to be in direct violation of regulation intended to promote long distance competition.

The Government's attempt to give the sacrifice test a broader role that it can undertake on the foundation of valid economics would even lead to dismissal of cases in which there is direct objective evidence of willfulness, quite apart from profit sacrifice. Where the challenged conduct is independently unlawful there should be no presumption (based upon the sacrifice test or any substitute criterion) that the conduct is pro-competitive merely because it is allegedly "profit-maximizing" to the defendant. Rather, in such a setting, the fact-finder should directly examine the economic logic and market consequences that flow from the defendant's decision to disregard regulations whose express purpose is to foster competition. And where it is clear that the defendant has violated a regulation that is intended to promote competition and that there is a reasonable likelihood that the defendant will gain or preserve monopoly power as a result of that violation, a *prima facie* case of "willfulness" has been established. This "causation" requirement is satisfied when the plaintiff can show that the ability of some efficient rivals to compete has been significantly reduced, that these rivals are important to the state of competition, and that there is no reasonable expectation of resulting significant entry or expansion by others not so impeded by the challenged conduct.

Amici do not suggest, of course, that antitrust courts should deem the demonstration of a *prima facie* case by a plaintiff to establish automatically a violation of section 2. Even in the case where a defendant has violated a competition-enhancing law and has the prospect of gaining or enhancing market power as a result of that violation, the defendant should still have the opportunity to prove that its refusal to deal is justified by a legitimate business practice (apart from the defense that the conduct must be *presumed* to be legitimate

because it was profit-driven). But whether such a credible and substantial legitimate business justification exists is clearly a factual issue to be resolved by the jury (if there is sufficient evidence for the complaint to survive summary judgment), and not on a motion to dismiss.

The Government conflates the two independent lines of inquiry. In its summary of the Court's recent decision upholding the Federal Communications Commission ("FCC") rules that govern the prices incumbent carriers can charge competitors for wholesale access to their networks, the Government notes that "[t]he resulting pricing rules may require ILECs to provide new entrants with access . . . at rates that are below the ILEC's historical cost [and the] resulting rules may also generate less revenue for the ILEC than would selling to retail customers directly." Gov't Br. at 3 (internal citations omitted). The Government is correct insofar as it asserts that a refusal to provide access at rates that are genuinely below production cost could conceivably serve as a legitimate basis for refusal to deal apart from its effects on competition (although *Amici* agree with the FCC and this Court that the FCC's "TELRIC" standard results in rates for access to incumbent network facilities that are not "below cost" in any economically defensible sense). But the same cannot be said about the refusal to sell if it is linked to the goal of *preserving* current margins on retail sales which are higher than margins earned on the "unbundled network elements" that the incumbents are required to lease to competitors. That is because Congress has expressly repudiated the existing pricing structure and determined that mandatory access is necessary to enable competition to push prices downward toward competitive levels. Although incumbent telephone monopolists evidently should not be required to go bankrupt for the sake of aiding rivals, their conduct should not be immunized from the antitrust laws simply because that conduct is profit-driven, given that Congress explicitly opened local telephone markets to

competition, *inter alia*, in order to eliminate supracompetitive profit margins. That is particularly true where, as here, regulators (and the Court) have expressly found that the standard used to set rates for wholesale access is fully compensatory of production costs and will not materially deter incumbents' incentives to innovate. *Verizon*, 535 U.S. at 517-23 & n.33.

And to the extent that the Government suggests that "willfulness" under section 2 of the Sherman Act must be evaluated without regard to the existence and operation of the Telecommunications Act of 1996 because of the Act's "savings clause," Gov't Br. at 18, its argument is precisely backwards. The savings clause provides only that "nothing in this Act or amendments made by this Act shall be construed to modify, impair, or supersede the *applicability* of any of the antitrust laws." Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b), 110 Stat. 56, 143 (emphasis added) (codified at 47 U.S.C. § 152 note). Treating violations of the Act as probative evidence of willfulness imposes no change in the "applicability" of the antitrust laws. On the contrary, requiring antitrust courts to ignore such evidence, as the Government seeks to require, would do so. "'The impact of regulation on pricing and other competitive factors is too obvious to be ignored'" and "'must be assessed simply as another fact of market life.'" *Phonetele, Inc.* v. *AT&T Co.*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, J.). "'Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.'" *Id.* (quoting 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 223d (1978)).

In sum, where Congress has found that the public interest is not well-served by particular conduct, notwithstanding the fact that it may be profit maximizing to the parties engaged in that conduct, there is no economically sound basis for a

strong (or, under the Government's view, dispositive) presumption that unilateral firm conduct that is profitable apart from its prospect of monopolizing the relevant market(s) should not be actionable under section 2. In promoting a broader role for the sacrifice test, the Government has ignored this limiting principle. Of course, *Amici* generally and strongly support the "sacrifice" standard, as evidenced by their own writings. However, support of this economically desirable standard must be informed and tempered by the broader public policy context in which antitrust defendants' market behavior must be examined. The sacrifice standard cannot be applied unthinkingly and automatically "across-the-board" and is simply not apposite where the challenged conduct is alleged to violate direct rules regulating natural monopolies that are intended to foster competition.

CONCLUSION

For all of the foregoing reasons, the *Amici* urge the Court to affirm the decision of the Second Circuit.

Respectfully submitted,

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July 25, 2003

APPENDIX

BACKGROUND AND QUALIFICATIONS OF *AMICI CURIAE*

WILLIAM J. BAUMOL

Curriculum Vitae

January 2003

Born February 26, 1922, New York, NY
Married, two children
BSS College of the City of New York, 1942
Ph.D. University of London, 1949
1942-43, 1946: Junior Economist, U.S. Dept. of Agriculture
1947-49: Assistant Lecturer, London School of Economics
1949-92: Professor of Economics, Princeton University
1983-2000: Director, C.V. Starr Center for Applied Economics, New York University

Current joint appointments:

Since 1992: Princeton University, Senior Research Economist & Emeritus Professor of Economics

Since 1971: New York University, Professor of Economics

AWARDS & HONORS:

1953 Fellow, Econometric Society

1965 Honorary LL.D, Rider College (Trustee, 1960-70)

1968 Joseph Douglas Green 1895 Professorship of Economics, Princeton University

1970 Honorary Fellow, London School of Economics, England

1971 Elected Member, American Academy of Arts and Sciences

1971 Honorary Doctorate, Stockholm School of Economics, Sweden

1973 Honorary Doctor of Humane Letters, Knox College 1973 Honorary Doctorate, University of Basel, Switzerland

1975 John R. Commons Award, Omicron Delta Epsilon

1975 Townsend Harris Medal, Alumni Assoc. of the City College of New York

1977 Elected Member, American Philosophical Society

1982 Distinguished Fellow, American Economic Association

1984 Distinguished Member, Economic Association of Puerto Rico

1986 Winner, Assoc. of American Publishers Award for Best Book in Business, Management and Economics, *Superfairness: Applications and Theory*

1987 Recipient, Frank E. Seidman Distinguished Award in Political Economy

1987 Elected Member, National Academy of Sciences

1989 Winner, Assoc. of Am. Publishers Annual Awards for Excellence in Publishing, Honorable Mention in Social Sciences, *Productivity and American Leadership: The Long View*

1992 Recipient, First Senior Scholar in the Arts and Sciences Award, New York University

1993 Winner, Assoc. of Environmental and Resource Economists Award for Publication of Enduring Quality, *The Theory of Environmental Policy*

1996 Honorary Degree, University of Limburg, Maastricht, Netherlands

1996 Honorary Professorship, University of Belgrano, Buenos Aires, Argentina

1997 Henry H. Villard Research Award, National Council on Economic Education and National Association of Economic Educators

1997 Docteur Honoris Causa, Universite des Sciences et Technologies de Lille, Lille, France

1999 Doctor Philosophiae Honoris Causa, Hebrew University of Jerusalem, Israel

1999 Doctor of Humane Letters Honoris Causa, Princeton University

2001 Docteur Honoris Causa, University of Paris, Sorbonne, France

2001 Elected Member, Accademia Nazionale Dei Lincei, Rome, Italy

2003 International Award for Entrepreneurship and Small Business Research, Swedish Foundation for Small Business Research and Swedish Business Development Agency

PROFESSIONAL ACTIVITIES:

Member, Board of Directors, Theater Development Fund

Correspondent, Committee on Human Rights, and member, Committee on the National Institute for the Environment, National Academy of Sciences

Member, Editorial Board of the Journal of Entrepreneurial Finance and Business Ventures

Past President: American Economic Association (1981), Association of Environmental and Resource Econo-

mists (1979), Eastern Economic Association (1978-79), Atlantic Economic Society (1985)

Past Chairman and Member, Economic Policy Council, State of New Jersey (1967-75)

Past Vice President (1968-70) and Chairman, Committee on Economic Status of the Profession (1962-70), American Association of University Professors

At various times on editorial and/or advisory boards for: *American Economic Review*; *Kyklos*; *Journal of Economic Literature*; *Journal of Cultural Economics*; *Journal of Economic Perspectives*; *Management Science*; *Economic Notes (Italy)*; *Journal of Economic Education*; *Impresa e Concorrenza (Italy)*; *THESIS: Theory and History of Economic and Social Institutions and Structures (USSR)*; *Feminist Economics*; *Japan and the World Economy*; *Supreme Court Economic Review*; *Economia: Revista Quadrimestral (Portugal)*.

Frequent consultant to government and industry, in U.S. and many other countries.

BOOKS PUBLISHED:

Economic Dynamics (with R. Turvey), 1951, 3rd ed. 1970.

Welfare Economics and the Theory of the State, 1952, 1965.

Economic Processes and Policies (with L.V. Chandler), 1954.

Business Behavior, Value and Growth, 1959, 2nd ed. 1966.

What Price Economic Growth? (with K. Knorr), 1961.

Economic Theory and Operations Analysis, 1961, 4th ed. 1976.

The Stock Market and Economic Efficiency, 1965.

Performing Arts: The Economic Dilemma (with W.G. Bowen), 1966.

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Economics of Academic Libraries (with M. Marcus), 1973.

The Theory of Environmental Policy (with W.E. Oates), 1975, 2nd ed. 1988.

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Economics, Environmental Policy, and the Quality of Life (with W.E. Oates and S.A. Batey Blackman), 1979.

Economics: Principles and Policy (with A.S. Blinder), 1979, 9th ed. 2002.

Public and Private Enterprise in a Mixed Economy (ed.), 1980.

Contestable Markets and the Theory of Industry Structure (with R.D. Willig and J.C. Panzar), 1982, revised ed. 1988.

Inflation and the Performing Arts (ed. with H. Baumol), 1984.

Productivity Growth and U.S. Competitiveness (ed. with K. McLennan), 1985.

Superfairness: Applications and Theory, 1986.

Microtheory: Applications and Origins, 1986 (compendium of Baumol articles).

The Information Economy and the Implications of Unbalanced Growth (with L. Osberg and E.N. Wolff), 1989.

Productivity and American Leadership: The Long View (with S.A. Batey Blackman and E.N. Wolff), 1989, paperback ed. 1991.

The Economics of Mutual Fund Markets: Competition vs. Regulation (with S.M. Goldfeld, L.A. Gordon and M.F. Koehn), 1990.

Perfect Markets and Easy Virtue: Business Ethics and the Invisible Hand (with S.A. Batey Blackman), 1991.

Entrepreneurship, Management and the Structure of Payoffs, 1993.

Toward Competition in Local Telephony (with J.G. Sidak), 1994.

Convergence of Productivity: Cross-National Studies and Historical Evidence (ed. with R.R. Nelson and E.N. Wolff), 1994.

Transmission Pricing and Stranded Costs in the Electric Power Industry (with J. Gregory Sidak), 1995.

Assessing Educational Practices: The Contribution of Economics (ed. with W.E. Becker), 1995.

Baumol's Cost Disease: The Arts and Other Victims (Ruth Towse, ed.), 1997 (compendium of Baumol articles).

Global Trade and Conflicting National Interests (with Ralph E. Gomory), 2000.

Welfare Economics (ed. with C.A. Wilson), Vol. I, II, III, 2001.

The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism, 2002.

Downsizing in America: Reality, Causes, and Consequences (with A.S. Blinder and E.N. Wolff), forthcoming in 2003.

Growth, Industrial Organization and Economic Generalities, forthcoming in 2003 (compendium of Baumol articles).

Plus approximately 500 articles published in professional journals.

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EDUCATION

1968-1973 Columbia University, New York, New York
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Doctoral Dissertation: Three Essays on Economic Theory, May 1973. Ph.D. 1973.

1967-1968 McGill University, Montreal, Canada
Departments of Economics and Political Science

1963-1966 Warsaw University, Warsaw, Poland
Department of Political Economy. B.A. (equiv.), 1966.

HONORS

1973 Columbia University: Highest distinction for the doctoral dissertation

1971-1972 Columbia University: Honorary President's Fellow

1969-1971 Columbia University: President's Fellow

1967-1968 McGill University: Honors Student

1964, 1965 Warsaw University: Award for Academic Achievement, Department of Political Economy

Who's Who in the World
Who's Who in America
Who's Who in the East

PROFESSIONAL EXPERIENCE

June 1982 - present — Professor of Economics
Department of Economics, New York University, New York, New York

Sept. 1996 - Aug. 2001 — Director of Masters in Economics Program
Department of Economics, New York University, New York, New York

Summer 1996-2000 — Lecturer
International Program on Privatization and Reform
Institute for International Development, Harvard University, Cambridge, Massachusetts

Aug. 1991 - Oct. 1992 — Deputy Assistant Attorney General for Economics
Antitrust Division
United States Department of Justice, Washington, D.C.

Sept. 1989 - July 1990 — Visiting Professor of Economics
School of Management, Yale University, New Haven, Connecticut

Lecturer in Law
Yale Law School

Mar. 1984 - June 1988 — Visiting Professor of Economics
Universita Commerciale "Luigi Bocconi", Milian, Italy

June 1982 - Feb. 1985 — Director of Graduate Studies
Department of Economics, New York University

Sept. 1982 - June 1986	Adjunct Professor of Law (part-time) Columbia University Law School, New York, New York
Feb. 1982 - June 1982	Acting Director of Graduate Studies Department of Economics, New York University
June 1978 - June 1982	Associate Professor of Economics Department of Economics, New York University
Sept. 1979 - May 1990	Lecturer in Economics and Antitrust New York University Law School
Sept. 1977 - June 1978	Member, Technical Staff Bell Laboratories, Holmdel, New Jersey
	Associate Professor of Economics Columbia University
	Visiting Research Scholar Center for Law and Economics, University of Miami, Miami, Florida
Sept. 1973 - Aug. 1977	Assistant Professor of Economics New York University
Summer 1976	Fellow, Legal Institute for Economists, Center for Law and Economics, University of Miami
Summer 1976	Visiting Researcher Bell Laboratories, Holmdel, New Jersey

OTHER PROFESSIONAL ACTIVITIES

2002 - present 1998 - present	Director, Competition Policy Associates, Washington, D.C. Senior Consultant Applied Economic Solutions, Inc., San Francisco, California
1997 - present	Board of Editors, Antitrust Report

1997 - 1999	Consultant, Inter-American Development Bank, Washington, D.C.
1995 - 2001	Consultant, The World Bank, Washington, D.C.
1995 - 2000	Senior Affiliate Cornerstone Research, Inc., Palo Alto, California
various	Testimony at Hearings of the Federal Trade Commission
1994 - 1996	Senior Affiliate Law and Economics Consulting Group, Emoryville, California
1994 - 2000	Senior Affiliate Consultants in Industry Economics, LLC, Princeton, New Jersey
1993 - 1994	Director Consultants in Industry Economics, Inc., Princeton, New Jersey
1992 - 1993	Vice-Chair (pro tempore) Economics Committee, American Bar Association, Chicago, Illinois
1992 - 1995 1990 - 1991	Senior Consultant Organization for Economic Cooperation and Development, Paris, France
1991	Member *Ad hoc* Working Group on Bulgaria's Draft Antitrust Law The Central and East European Law Initiative American Bar Association
1990 - 1991	Advisor Polish Ministry of Finance and Anti-Monopoly Office Warsaw, Poland

1990 - 1991	Member Special Committee on Antitrust Section of Antitrust Law, American Bar Association
1990 - 1991	Director and Senior Advisor Putnam, Hayes & Bartlett, Inc., Washington, D.C.
1990 - 1996	Member Predatory Pricing Monograph Task Force Section of Antitrust Law, American Bar Association
1989	Hearings on Competitive Issues in the Cable TV Industry Subcommittee on Monopolies and Business Rights of the Senate Judiciary Committee Washington, D.C.
1989	Member EEC Merger Control Task Force, American Bar Association
1988 - present	Associate Member American Bar Association
1987 - 1989	Adjunct Member Antitrust and Trade Regulation Committee, The Association of the Bar of the City of New York
1984	Speaker, "Industrial and Intellectual Property: The Antitrust Interface" National Institutes, American Bar Association, Philadelphia, Pennsylvania
1983 - 1990	Director Consultants in Industry Economics, Inc
1982	Member Organizing Committee

	Tenth Annual Telecommunications Policy Research Conference, Annapolis, Maryland
1981	Member Section 7 Clayton Act Committee, Project on Revising Merger Guidelines American Bar Association
1980	Organizer Invited Session on Law and Economics American Economic Association Meetings, Denver, Colorado
1978 - 1979	Member Department of Commerce Technical Advisory Board Scientific and Technical Information Economics and Pricing Subgroup
1978 - present	Referee for numerous scholarly journals, publishers, and the National Science Foundation

MEMBERSHIPS IN PROFESSIONAL SOCIETIES

American Economic Association
American Bar Association

PUBLICATIONS

A. Journal Articles

"All-units Discounts in Retail Contracts," with S. Kolay and G. Shaffer, *J. of Economics and Management Strategy*, (forthcoming).

"Archimedean Leveraging and the GE/Honeywell Transaction," with R. J. Reynolds, *Antitrust Law Journal*, vol. 70, no. 1, 2002, 171-98.

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M. A. Dutz and R. D. Willig, *European Economic Review*, vol. 4, no. 4-6, May 2000.

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"Equilibrium Vertical Foreclosure: A Reply," with G. Saloner and S.C. Salop, *American Economic Review*, vol. 82, no. 3, 1992, 698-703.

"A Patent System for Both Diffusion and Exclusion," *Journal of Economic Perspectives*, vol. 5, Winter 1991, 43-60.

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"Conflicts of Jurisdiction: Antitrust and Industrial Policy," *Law and Contemporary Problems*, vol. 50, Summer 1987, 165-178.

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"The G.M.-Toyota Joint Venture: An Economic Assessment," with C. Shapiro, *Wayne Law Journal*, vol. 31, no. 4, 1985, 1167-1194.

"Economic Foundations and Considerations in Protecting Industrial and Intellectual Property: An Introduction," *ABA Antitrust Law Journal*, vol. 53, no. 3, 1985. 503-518, Comments, 523-532.

"Antitrust for High-Technology Industries: Assessing Research Joint Ventures and Mergers," with R.D. Willig, *Journal of Law and Economics*, vol. 28, May 1985, 311-334.

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"Advances in Supervision Technology and Economic Welfare: A General Equilibrium Analysis," with C. Shapiro, *Journal of Public Economics*, vol. 25/3, 1985, 371-390.

"Predatory Systems Rivalry: A Reply," with A. O. Sykes and R. D. Willig, 83 *Columbia Law Review*, June 1983, 1150-1166. Reprinted in *Corporate Counsel*, Matthew Bender & Company, 1984, 433-450.

"The 1982 Department of Justice Merger Guidelines: An Economic Assessment," with R. D. Willig, 71 *California Law Review*, March 1983,535-574. Reprinted in *Antitrust Policy in Transition: The Convergence of Law and Economics*, E. Fox and J. Halverson (eds.), American Bar Association Press, 1984, 267-304.

"Unfair International Trade Practices," with A. O. Sykes and R. D. Willig, 15 *Journal of International Law and Politics*, Winter 1983, 323-338.

"On Non-linear Pricing of Inputs," with J. Panzar, *International Economic Review*, October 1982, 659-675.

"Herfindahl Concentration, Rivalry and Mergers," with A. O. Sykes and R. D. Willig, *Harvard Law Review*, vol. 95, June 1982, 1857-1875.

"A Reply to 'Journals as Shared Goods: Comment,'" with R. D. Willig, *American Economic Review*, June 1982, 603-607.

"Proposed Revisions to the Justice Department's Merger Guidelines," with S. Edwards, *et al.*, *Columbia Law Review*, vol. 81, December 1981, 1543-1591.

"An Economic Definition of Predation: Pricing and Product Innovation," with R.D. Willig, *Yale Law Journal*, vol. 91, November 1981, 8-53.

"On the Consequences of Costly Litigation in the Model of Single Activity Accidents: Some New Results," *Journal of Legal Studies*, June 1981, 269-291.

"On the Political Sustainability of Taxes," with A. Schotter, *American Economic Review Papers and Proceedings*, May 1981, 278-282.

"Information and the Law: Evaluating Legal Restrictions on Competitive Contracts," with A. Weiss, *American Economic Review Papers and Proceedings*, May 1981, 399-404.

"Redistributing Incomes: *Ex Ante* or *Ex Post*," *Economic Inquiry*, April 1981, 333-349.

"On the Nonexistence of *Pareto Superior* Outlay Schedules," with J. Panzar, *The Bell Journal of Economics*, Spring 1980, 351-354.

"The Role of Information in the Design of Public Policy Towards Externalities," with R. D. Willig, *Journal of Public Economics*, December 1979, 271-299.

"On the Concept of Optimal Taxation in the Overlapping-Generations Model of Efficient Growth," with E.S. Phelps, *Journal of Public Economics*, August 1979, 1-27.

"Products Liability in Markets With Heterogeneous Consumers," *Journal of Legal Studies*, June 1979, 505-525.

"Costly Litigation and the Tort Law: Single Activity Accidents," *Journal of Legal Studies*, June 1978, 243-261.

"On the Optimal Provision of Journals Qua Excludable Public Goods," with R. D. Willig, *American Economic Review*, June 1978, 324-338.

"Distortionary Wage Differentials in a Two-Sector Growth Model: Some Theorems on Factor Earnings," *International Economic Review*, June 1978, 321-333.

"On the Optimality of Public-Goods Pricing with Exclusion Devices," with W.J. Baumol, *Kyklos*, Fasc. 1, 1977, 5-21.

"Public Good Properties in Reality: The Case of Scientific Journals," with W.J. Baumol, *Proceedings of the ASIS Meetings*, San Francisco, October 1976.

"Merger Illusions and Externalities: A Note," with A. Schotter, *Eastern Economic Review*, November 1976, 19-21.

"Distributive Justice and Optimal Taxation of Wages and Interest in a Growing Economy," *Journal of Public Economics*, January 1976, 139-160.

"Linear Taxation of Wealth and Wages for Intragenerational Lifetime Justice: Some Steady-State Cases," with E.S. Phelps, *American Economic Review*, September 1975, 660-673.

B. Books and Monographs

Proceedings of the Tenth Annual Telecommunications Policy Research Conference, editor with O. Gandy and P. Espinosa, ABLEX Publishers, 1983.

Obstacles to Trade and Competition, with L. Goldberg, OECD, Paris, 1993.

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C. Book Chapters

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Regulation and Policy Analysis Program, National Science Foundation, Collaborative Research on Antitrust Policy, Principal Investigator, July 15, 1985 - December 31, 1986.

Regulation of Economic Activity Program, National Science Foundation, Microeconomic Analysis of Antitrust Policy, Principal Investigator, April 1, 1983 - March 31, 1984.

Economics Division of the National Science Foundation, "Political Economy of Taxation," Principal Investigator, Summer 1982.

Sloan Workshop in Applied Microeconomics (coordinator), with W.J. Baumol (Principal Coordinator), September 1977 - August 1982.

Economics Division of the National Science Foundation, "Collaborative Research on the Theory of Optimal Taxation and Tax Reform," July 1979 to September 1980, with E.S. Phelps.

Division of Science Information of the National Science Foundation for Research on "Scale Economies and Public

Goods Properties of Information," W.J. Baumol, Y.M. Braunstein, M.I. Nadiri, Fall 1974 to Fall 1977.

National Science Foundation Institutional Grant to New York University for Research on Taxation and Distribution of Income, Summer 1974.

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Education

1975 Ph.D., Economics, Princeton University

1969 M.A., Economics, Princeton University

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1967 B.A., Economics, Yale University, *cum laude* with High Honors in Economics

Experience

Principal, MICRA: Microeconomic Consulting and Research Associates, Inc., Washington, D.C.; August 1991 - present.

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Visiting Lecturer of Public and International Affairs, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, NJ; Spring Semester, 1991.

Senior Vice President, ICF Consulting Associates, Inc., Washington, D.C.; November 1989 - August 1991.

Research Associate Professor of Psychology, The American University, Washington, D.C.; September 1983 - 1990.

Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Department of Justice, Washington, D.C.; October 1985 - May 1989.

Director, Economic Policy Office, Antitrust Division, U.S. Department of Justice, Washington, D.C.; September 1983 - September 1985.

Research Associate, Center for the Study of American Business, Washington University in St. Louis; July 1978 - June 1985.

Associate Professor, Department of Economics, Washington University in St. Louis; July 1978 - June 1985. Chairman, Graduate Committee, 1978 - 1980. Chairman, Undergraduate Committee, 1980 - 1983.

Assistant Professor, Department of Economics, Washington University in St. Louis; September1972 - June 1978.

Assistant in Instruction, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, N.J.; 1969 - 1971.

Research Consultant, Ford Foundation, Kingston, Jamaica, W.I.; Summer 1969.

Fields Taught

Graduate: Industrial Organization, Economic Development and Planning, Microeconomic Theory, International Trade, International Finance, Economic Theories of Behavior, Applied Microeconomics.

Undergraduate: Government and Business, Industrial Organization, International Trade, International Finance, Economic Development, Intermediate Microeconomic

Theory, Intermediate Macroeconomic Theory, Introductory Microeconomic Theory, Introductory Macroeconomic Theory.

Grants

National Science Foundation. Grant title: "Income Maximizing in Choice and Rate Effects," 1988 - 1991.

National Science Foundation. Grant title: "Application of Economic Theory to Operant Schedule Effects," 1985 - 1987.

National Science Foundation. Grant title: "Income and Choice," 1983 - 1985.

Professional Activities

Referee, *American Economic Review, The Bell Journal of Economics/Rand Journal, Economic Inquiry, Industrial Organization Review, Journal of Industrial Economics, Journal of Law and Economics, Journal of Political Economy, Quarterly Journal of Economics, Southern Economic Journal.*

Member, Editorial Board, *International Journal of the Economics of Business.*

Member, American Bar Association, American Economic Association, Southern Economic Association, Western Economic Association.

Languages

French, German

Publications

"The Contribution of the Merger Guidelines to the Analysis of Non-Horizontal Mergers," 20th Anniversary of the 1982 Merger Guidelines: The Contribution of the Merger Guidelines to the Evolution of Antitrust Doctrine, on http://www.usdoj.gov/atr/hmerger.htm#papers.

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"Congestion Pricing at Airports," ACI-NA 11th Annual Conference, Salt Lake City, November 12, 2002; 2001 FAA Commercial Aviation Forecast Conference, Washington, D.C., March 14, 2001; ACI-NA 9th Annual Conference, New York City, October 3, 2000.

FTC Workshop: Competition Policy in the World of B2B Electronic Marketplaces, June 30, 2000.

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"Consumers, Consolidation, and Concentration: Policy Issues,": at the ERS of the USDA conference, The American Consumer and the Changing Structure of Food System, May 4, 2000.

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"Proving Damages in a Business Case," Business Litigation Seminar, Business Law Section of the Florida Bar, November 20 (Tampa) - 21 (Miami), 1997.

"Basic Economics for Lawyers," Section of Antitrust Law, American Bar Association, New York, N.Y., October 3-4, 1996.

"Vertical Control in the Entertainment Industry," Chair's Showcase Program: The Integration, Disintegration and Reintegration of the Entertainment Industry, American Bar Association, Section of Antitrust Law, 44th Annual Antitrust Spring Meeting, Washington D.C., March 28, 1996.

"Privatization and Regulation in the Restructuring of Electric Utilities in Eastern Europe," IBRD Conference on the Privatization of Electric Utilities, Prague, The Czech Republic, September 1993.

"Implications of the United States Experience with Regulation and Antitrust for Competition Policy in Countries in Transition from Centrally Planned Economies to Market Economies," IBRD/EDI/USAID Seminar on Microeconomics, Vienna, Austria, July 1993.

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"The Economics of Credit Card Interest Rate Caps," Seminars at the Economic Analysis Group, U.S. Department of Justice, September 29, 1992; the Board of Governors of the Federal Reserve System, October 7, 1992; and the D.C. Bar Association, November 19, 1992.

"Straws in the Bottleneck: A Proposal for Efficient Network Interconnection," presented at the Tenth Biennial Conference of the International Telecommunications

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Power Mosfet Technologies, L.L.C. Expert witness in *Power Mosfet Technologies, L.L.C. vs. Infineon Technologies Corp., et al.*, U.S. District Court, Eastern District of Texas, Marshall Division, Cause No. 2-99-CV00168-DF. Expert Report; Deposition August 11, 2001; Trial testimony August 29, 2001.

Southwest Recreational Industries: Expert witness in *Southwest Recreational Industries v. FieldTurf, Inc.* Trial testimony November 28, 2000.

Anthony D. Viazis: Expert witness in *Anthony D. Viazis v. American Association of Orthodontists*. U.S. District Court, Eastern District of Texas, Sherman Division. Civil Action No. 4:98-CV-245, Expert report (with David Eisenstadt), July 13, 2000. Trial testimony November 9, 2000.

Ventana Medical Systems: Report and testimony, Department of Energy, March 8, 2000.

State of Alaska: Testimony before State legislature on the acquisition of ARCO by BP, January 19, 2000.

State of New York, et al., and U.S. Department of Justice: Expert witness in *United States of America v. Microsoft Corporation, and State of New York ex rel. v. Microsoft Corporation*. C.A. No. 98-1232 (TPJ) and CA. No. 98-1233 (TTPJ). Declaration May 15, 1998, Report September 3, 1998, Deposition September 26, 1998, Direct Testimony and Trial Testimony November 19 - December 1, 1998.

Brunswick Corporation: Expert witness in *Concord Boat Co. et al. v. Brunswick Corporation*. U.S. District Court, Eastern District of Arkansas, Western Division. Trial testimony June 11, 1998. Depositions February 2-4, 1998.

Bepco, Inc.: Deposition in *Bepco, Inc. et al. v. Allied Signal, Inc. and Allied Signal Truck Brake System Company*, U.S. District Court for the Middle District of North Carolina Winston-Salem Division. C.A. No. 6:96CV00274, November 25-26, 1998.

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U.S. Department of Justice, Antitrust Division: (a) Expert witness in *U.S. v. AT&T*, 1981; (b) Regulation of oil pipelines, August 1983; (c) Expert witness in *United*

States of America v. Engelhard Corporation, Floridin Company, U.S. Borax Inc., U.S. Silica Inc. Case No. 6:96-CV-45 (WLS), Depositions, Trial Testimony August 1995 (d) Declaration in *United States of America v. Dairy Farmer of America, Inc., et al.*

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Financial Interest and Syndication Rule," June 14, 1990; "Reply Comments," August 1, 1990; "Economic Analysis and Policy Implications of the Financial Interest and Syndication Rule," January 24, 1991, with John Woodbury; (c) Declaration of Frederick R. Warren-Boulton, August 7, 1992, Exhibit 7, Comments of the Coalition to Preserve the Financial Interest and Syndication Rule on Proposed Modification of Network Consent Decrees. In *United States of America v. CBS, Inc.* Civil No. 74-3599-RJK, *United States of America v. American Broadcasting Companies, Inc.* Civil No. 74-3600-RJK, and *United States of America v. National Broadcasting Company, Inc.* Civil No. 74-3601-RJK.

California Public Utility Commission, Division of Ratepayer Advocacy: Proposed merger of Southern California Edison Company and San Diego Gas and Electric Company, July 1990.

Altai, Inc.: Expert witness in *Computer Associates, Inc. v. Altai, Inc.*, April 1990.

NFL Players Association: Deposition in *Marvin Powell v. National Football League*, September 1989.

Consolidated Aluminum Corporation: Deposition in *Indal, Inc. v. Consolidated Aluminum Corp.*, April 1983.

Battelle, Pacific Northwest Laboratories. Analyses of bidding for offshore oil leases and of the effects of Building Energy Performance Standards on energy demand, September 1979 -1981.

U.S. Senate Commerce Committee, Senator Danforth presiding: Testimony on corporate average fuel economy (CAFÉ) standards, November 15, 1979.

State of Missouri, Office of the Public Counsel: Expert witness on electric utility rate structures, 1978.

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Curriculum Vitae

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Education:

Ph.D. Economics,
Stanford University, 1973

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Advisor: James Rosse

M.S. Operations Research,
Stanford University, 1968.

A.B. Mathematics,
Harvard University, 1967.

Professional Positions:

Professor of Economics and Public Affairs, Princeton University, 1978-.

Principal External Advisor, Infrastructure Program, Inter-American Development Bank, 6/97-8/98.

Deputy Assistant Attorney General, U.S. Department of Justice, 1989-91.

Supervisor, Economics Research Department, Bell Laboratories, 1977-78.

Visiting Lecturer (with rank of Associate Professor), Department of Economics and Woodrow Wilson School, Princeton University, 1977-78 (part time).

Economics Research Department, Bell Laboratories, 1973-77.

Lecturer, Economics Department, Stanford University, 1971-73.

Other Professional Activities:

Advisory Board, *Electronic Journal of Industrial Organization and Regulation Abstracts*, 1996-.

Visiting Faculty Member (occasional), International Program on Privatization and Regulatory Reform, Harvard Institute for International Development, 1996-2000.

Member, National Research Council Highway Cost Allocation Study Review Committee, 1995-98.

Member, Defense Science Board Task Force on the Antitrust Aspects of Defense Industry Consolidation, 1993-94.

Editorial Board, *Utilities Policy*, 1990-

Leif Johanson Lecturer, University of Oslo, November 1988.

Member, New Jersey Governor's Task Force on Market-Based Pricing of Electricity, 1987-1989.

Co-editor, *Handbook of Industrial Organization*, 1984-89.

Associate Editor, *Journal of Industrial Economics*, 1984-89.

Director, Consultants in Industry Economics, Inc., 1983-89, 1991-94.

Fellow, Econometric Society, 1981-.

Organizing Committee, Carnegie-Mellon-N.S.F. Conference on Regulation, 1985.

Board of Editors, *American Economic Review*, 1980-83.

Nominating Committee, American Economic Association, 1980-81.

Research Advisory Committee, American Enterprise Institute, 1980-86.

Editorial Board, M.I.T. Press Series on Government Regulation of Economic Activity, 1979-93.

Program Committee, 1980 World Congress of the Econometric Society.

Program Committee, Econometric Society, 1979, 1981, 1985.

Organizer, American Economic Association Meetings: 1980, 1982.

American Bar Association Section 7 Clayton Act Committee, 1981.

Principal Investigator, NSF grant SOC79-0327, 1979-80; NSF grant 285-6041, 1980-82; NSF grant SES-8038866, 1983-84, 1985-86.

Aspen Task Force on the Future of the Postal Service, 1978-80.

Organizing Committee of Sixth Annual Telecommunications Policy Research Conference, 1977-78.

Visiting Fellow, University of Warwick, July 1977.

Institute for Mathematical Studies in the Social Sciences, Stanford University, 1975.

Consulting: Bell Laboratories, 1978-79; AT&T, 1978-89, 1991-; Conrail 1978-87, 1991-97; Federal Trade Commission, 1979-82, 1994-96; Pennsylvania Bell, 1980; Simpson Thatcher Bartlett, 1980, 1993-98; American Association of Railroads, 1981, 1985; Math-tech, 1981; Union Pacific Railroad, 1981, 1995-99; Family Lines Rail System, 1982; Pepper, Hamilton, and Scheetz, 1981-87, 1991-98, 2001; Siemens Corp., 1982; Board of Governors of U. S. Postal Service, 1981; OECD, 1983-85, 1991-95; Sidley & Austin, 1983-89, 1991-; U.S. Postal Service, 1983-84; Echlin Inc., 1982-83; United Airlines, 1983, 1991-98; Consultants in Industry Economics, 1983-89, 1991-; Wiley, Malehorn & Sirota, 1983-89; City of Newark, 1984; Arnold & Porter, 1986-89, 1991-2000; Howrey & Simon, 1985-88, 1993-;

Kodak, 1987-89; Crowell & Moring, 1988; Viacom 1989, 1991-98; Bell Atlantic, 1991-94; Intel, 1991-93; AOPL, 1993; IBM, 1993-96; Merck, 1993-95; Harkins Cunningham, 1993-96; Boeing, 1993-98; Niagra Mohawk, 1994; PSE&G, 1994-96; Microsoft, 1994; Coca-Cola Co., 1994-2001; Digital Equipment Corp. 1997-98; World Bank 1994-98; Inter-American Development Bank, 1997-2000; Steptoe & Johnson, 1997-; Air Transport Association of America, 1998; American Electric Power, 1999-2001; Cravath, Swaine & Moore, 1998-; Skadden Arps, 1999-2001; Amgen, 2000-02; Comcast, 2000; Williams & Connolly, 2000; New Power Corporation, 2001. Freddie Mac, 2002.

Published Articles and Book Chapters:

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"Market Power and Market Definition," (with J. Ordover), Memorandum for ABA Section 7 Clayton Act Committee, Project on Revising the Merger Guidelines, May 1981.

"The Continuing Need for and National Benefits Derived from the REA Telephone Loan Programs - An Economic Assessment," 1981.

"The Economics of Equipment Leasing: Costing and Pricing," 1980.

"Rail Deregulation and the Financial Problems of the U.S. Railroad Industry," (with W.J. Baumol), report prepared under contract to Conrail, 1979.

"Price Indexes and Intertemporal Welfare," Bell Laboratories Economics Discussion Paper, 1974.

"Consumer's Surplus: A Rigorous Cookbook," Technical Report #98, Economics Series, I.M.S.S.S., Stanford University, 1973.

"An Economic-Demographic Model of the Housing Sector," (with B. Hickman and M. Hinz), Center for Research in Economic Growth, Stanford University, 1973.

Invited Conference Presentations:

ABA Section of Antitrust Law 2002 Fall Forum
"Competition, Regulation and Pharmaceuticals" 2002

Fordham Conference on International Antitrust Law and Policy
"Substantive Standards for Mergers and the Role of Efficiencies" 2002

Department of Justice Telecom Workshop
"Stimulating Investment and the Telecommunications Act of 1996" 2002

Department of Commerce Conference on the State of the Telecom Sector
"Stimulating Investment and the Telecommunications Act of 1996" 2002

Law and Public Affairs Conference on the Future of Internet Regulation
"Open Access and Competition Policy Principles" 2002

Center for Economic Policy Studies Symposium on Energy Policy
"The Future of Power Supply" 2002

The Conference Board: Antitrust Issues in Today's Economy
"The 1982 Merger Guidelines at 20" 2002

Federal Energy Regulatory Commission Workshop
"Effective Deregulation of Residential Electric Service" 2001

IPEA International Seminar on Regulation and Competition
"Electricity Markets: Deregulation of Residential Service" 2001
"Lessons for Brazil from Abroad" 2001

ABA Antitrust Law Section Task Force Conference
"Time, Change, and Materiality for Monopolization Analyses" 2001

Harvard University Conference on American Economic Policy in the 1990s
"Comments on Antitrust Policy in the Clinton Administration" 2001

Tel-Aviv Workshop on Industrial Organization and Anti-Trust
"The Risk of Contagion from Multimarket Contact" 2001

2001 Antitrust Conference
"Collusion Cases: Cutting Edge or Over the Edge?" 2001
"Dys-regulation of California Electricity" 2001

FTC Public Workshop on Competition Policy for E-Commerce
"Necessary Conditions for Cooperation to be Problematic" 2001

HIID International Workshop on Infrastructure Policy
"Infrastructure Privatization and Regulation" 2000

Villa Mondragone International Economic Seminar
"Competition Policy for Network and Internet Markets" 2000

New Developments in Railroad Economics: Infrastructure Investment and Access Policies
"Railroad Access, Regulation, and Market Structure" 2000

The Multilateral Trading System at the Millennium
"Efficiency Gains From Further Liberalization" 2000

Singapore – World Bank Symposium on Competition Law and Policy
"Policy Towards Cartels and Collusion" 2000

CEPS: Is It a New World?: Economic Surprises of the Last Decade
"The Internet and E-Commerce" 2000

Cutting Edge Antitrust: Issues and Enforcement Policies
"The Direction of Antitrust Entering the New Millennium" 2000

The Conference Board: Antitrust Issues in Today's Economy
"Antitrust Analysis of Industries With Network Effects" 1999

CEPS: New Directions in Antitrust
"Antitrust in a High-Tech World" 1999

World Bank Meeting on Competition and Regulatory Policies for Development
"Economic Principles to Guide Post-Privatization Governance" 1999

1999 Antitrust Conference
"Antitrust and the Pace of Technological Development" 1999
"Restructuring the Electric Utility Industry" 1999

HIID International Workshop on Privatization, Regulatory Reform and Corporate Governance
"Privatization and Post-Privatization Regulation of Natural Monopolies" 1999

The Federalist Society: Telecommunications Deregulation: Promises Made, Potential Lost?
"Grading the Regulators" 1999

Inter-American Development Bank: Second Generation Issues In the Reform Of Public Services
"Post-Privatization Governance" 1999
"Issues Surrounding Access Arrangements" 1999

Economic Development Institute of the World Bank – Program on Competition Policy
"Policy Towards Horizontal Mergers" 1998

Twenty-fifth Anniversary Seminar for the Economic Analysis Group of the Department of Justice
"Market Definition in Antitrust Analysis" 1998

HIID International Workshop on Privatization, Regulatory Reform and Corporate Governance
"Infrastructure Architecture and Regulation: Railroads" 1998

EU Committee Competition Conference – Market Power
"US/EC Perspective on Market Definition" 1998

Federal Trade Commission Roundtable
"Antitrust Policy for Joint Ventures" 1998

1998 Antitrust Conference
"Communications Mergers" 1998

The Progress and Freedom Foundation Conference on Competition, Convergence, and the Microsoft Monopoly
"Access and Bundling in High-Technology Markets" 1998

FTC Program on The Effective Integration of Economic Analysis into Antitrust Litigation
"The Role of Economic Evidence and Testimony" 1997

FTC Hearings on Classical Market Power in Joint Ventures
"Microeconomic Analysis and Guideline" 1997

World Bank Economists – Week IV Keynote
"Making Markets More Effective With Competition Policy" 1997

Brookings Trade Policy Forum
"Competition Policy and Antidumping: The Economic Effects" 1997

University of Malaya and Harvard University Conference on The Impact of Globalisation and Privatisation on Malaysia and Asia in the Year 2020
"Microeconomics, Privatization, and Vertical Integration" 1997

ABA Section of Antitrust Law Conference on The Telecommunications Industry
"Current Economic Issues in Telecommunications" 1997

Antitrust 1998: The Annual Briefing
"The Re-Emergence of Distribution Issues" 1997

Inter-American Development Bank Conference on Private Investment, Infrastructure Reform and Governance in Latin America & the Caribbean
"Economic Principles to Guide Post-Privatization Governance" 1997

Harvard Forum on Regulatory Reform and Privatization of Telecommunications in the Middle East
"Privatization: Methods and Pricing Issues" 1997

American Enterprise Institute for Public Policy Research Conference
"Discussion of Local Competition and Legal Culture" 1997

Harvard Program on Global Reform and Privatization of Public Enterprises
"Infrastructure Privatization and Regulation: Freight" 1997

World Bank Competition Policy Workshop
"Competition Policy for Entrepreneurship and Growth" 1997

Eastern Economics Association Paul Samuelson Lecture
"Bottleneck Access in Regulation and Competition Policy" 1997

ABA Annual Meeting, Section of Antitrust Law
"Antitrust in the 21st Century: The Efficiencies Guidelines" 1997

Peruvian Ministry of Energy and Mines Conference on Regulation of Public Utilities
"Regulation: Theoretical Context and Advantages vs. Disadvantages" 1997

The FCC: New Priorities and Future Directions
"Competition in the Telecommunications Industry" 1997

American Enterprise Institute Studies in Telecommunications Deregulation
"The Scope of Competition in Telecommunications" 1996

George Mason Law Review Symposium on Antitrust in the Information Revolution
"Introduction to the Economic Theory of Antitrust and Information" 1996

Korean Telecommunications Public Lecture
"Market Opening and Fair Competition" 1996

Korea Telecommunications Forum
"Desirable Interconnection Policy in a Competitive Market" 1996

European Association for Research in Industrial Economics Annual Conference
"Bottleneck Access: Regulation and Competition Policy" 1996

Harvard Program on Global Reform and Privatization of Public Enterprises
"Railroad and Other Infrastructure Privatization" 1996

FCC Forum on Antitrust and Economic Issues Involved with InterLATA Entry
"The Scope of Telecommunications Competition" 1996

Citizens for a Sound Economy Policy Watch on Telecommunications Interconnection
"The Economics of Interconnection" 1996

World Bank Seminar on Experiences with Corporatization
"Strategic Directions of Privatization" 1996

FCC Economic Forum on the Economics of Interconnection
"Lessons from Other Industries" 1996

ABA Annual Meeting, Section of Antitrust Law
"The Integration, Disintegration, and Reintegration of the Entertainment Industry" 1996

Conference Board: 1996 Antitrust Conference
"How Economics Influences Antitrust and Vice Versa" 1996

Antitrust 1996: A Special Briefing
"Joint Ventures and Strategic Alliances" 1996

New York State Bar Association Section of Antitrust Law Winter Meeting
"Commentary on Horizontal Effects Issues" 1996

FTC Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age
"Vertical Issues for Networks and Standards" 1995

Wharton Seminar on Applied Microeconomics
"Access Policies with Imperfect Regulation" 1995

Antitrust 1996, Washington D.C.
"Assessing Joint Ventures for Diminution of Competition" 1995

ABA Annual Meeting, Section of Antitrust Law
"Refusals to Deal – Economic Tests for Competitive Harm" 1995

FTC Seminar on Antitrust Enforcement Analysis
"Diagnosing Collusion Possibilities" 1995

Philadelphia Bar Education Center: Antitrust Fundamentals
"Antitrust – The Underlying Economics" 1995

Vanderbilt University Conference on Financial Markets
"Why Do Christie and Schultz Infer Collusion From Their Data?" 1995

ABA Section of Antitrust Law Chair's Showcase Program
"Discussion of Telecommunications Competition Policy" 1995

Conference Board: 1995 Antitrust Conference
"Analysis of Mergers and Joint Ventures" 1995

ABA Conference on The New Antitrust: Policy of the '90s
"Antitrust on the Super Highways/Super Airways" 1994

ITC Hearings on The Economic Effects of Outstanding Title VII Orders
"The Economic Impacts of Antidumping Policies" 1994

OECD Working Conference on Trade and Competition Policy
"Empirical Evidence on The Nature of Anti-dumping Actions" 1994

Antitrust 1995, Washington D.C.
"Rigorous Antitrust Standards for Distribution Arrangements" 1994

ABA – Georgetown Law Center: Post-Chicago Economics: New Theories – New Cases?
"Economic Foundations for Vertical Merger Guidelines" 1994

Conference Board: Antitrust Issues in Today's Economy
"New Democrats, Old Agencies: Competition Law and Policy" 1994

Federal Reserve Board Distinguished Economist Series
"Regulated Private Enterprise Versus Public Enterprise" 1994

Institut d'Etudes Politiques de Paris
"Lectures on Competition Policy and Privatization" 1993

Canadian Bureau of Competition Policy Academic Seminar Series, Toronto
"Public Versus Regulated Private Enterprise" 1993

CEPS Symposium on The Clinton Administration: A Preliminary Report Card
"Policy Towards Business" 1993

Columbia Institute for Tele-Information Conference on Competition in Network Industries, New York, NY
"Discussion of Deregulation of Networks: What Has Worked and What Hasn't" 1993

World Bank Annual Conference on Development Economics
"Public Versus Regulated Private Enterprise" 1993

Center for Public Utilities Conference on Current Issues Challenging the Regulatory Process, Santa Fe, NM
"The Economics of Current Issues in Telecommunications Regulation" 1992
"The Role of Markets in Presently Regulated Industries" 1992

The Conference Board's Conference on Antitrust Issues in Today's Economy, New York, NY
"Antitrust in the Global Economy" 1992
"Monopoly Issues for the '90s" 1993

Columbia University Seminar on Applied Economic Theory, New York, NY
"Economic Rationales for the Scope of Privatization" 1992

Howrey & Simon Conference on Antitrust Developments, Washington, DC
"Competitive Effects of Concern in the Merger Guidelines" 1992

Arnold & Porter Colloquium on Merger Enforcement, Washington, DC
"The Economic Foundations of the Merger Guidelines" 1992

American Bar Association, Section on Antitrust Law Leadership Council Conference, Monterey, CA
"Applying the 1992 Merger Guidelines" 1992

OECD Competition Policy Meeting, Paris, France
"The Economic Impacts of Antidumping Policy" 1992

Center for Public Choice Lecture Series, George Mason University Arlington, VA
"The Economic Impacts of Antidumping Policy" 1992

Brookings Institution Microeconomics Panel, Washington, DC,
"Discussion of the Evolution of Industry Structure" 1992

AT&T Conference on Antitrust Essentials
"Antitrust Standards for Mergers and Joint Ventures" 1991

ABA Institute on The Cutting Edge of Antitrust: Market Power
"Assessing and Proving Market Power: Barriers to Entry" 1991

Second Annual Workshop of the Competition Law and Policy Institute of New Zealand
"Merger Analysis, Industrial Organization Theory, and Merger Guidelines" 1991
"Exclusive Dealing and the *Fisher & Paykel* Case" 1991

Special Seminar of the New Zealand Treasury
"Strategic Behavior, Antitrust, and The Regulation of Natural Monopoly" 1991

Public Seminar of the Australian Trade Practices Commission
"Antitrust Issues of the 1990's" 1991

National Association of Attorneys General Antitrust Seminar
"Antitrust Economics" 1991

District of Columbia Bar's 1991 Annual Convention
"Administrative and Judicial Trends in Federal Antitrust Enforcement" 1991

ABA Spring Meeting
"Antitrust Lessons From the Airline Industry" 1991

Conference on The Transition to a Market Economy – Institutional Aspects
"Anti-Monopoly Policies and Institutions" 1991

Conference Board's Thirtieth Antitrust Conference
"Antitrust Issues in Today's Economy" 1991

American Association for the Advancement of Science Annual Meeting
"Methodologies for Economic Analysis of Mergers" 1991

General Seminar, Johns Hopkins University
"Economic Rationales for the Scope of Privatization" 1991

Capitol Economics Speakers Series
"Economics of Merger Guidelines" 1991

CRA Conference on Antitrust Issues in Regulated Industries
"Enforcement Priorities and Economic Principles" 1990

Pepper Hamilton & Scheetz Anniversary Colloquium
"New Developments in Antitrust Economics" 1990

PLI Program on Federal Antitrust Enforcement in the 90's
"The Antitrust Agenda of the 90's" 1990

FTC Distinguished Speakers Seminar
"The Evolving Merger Guidelines" 1990

The World Bank Speakers Series
"The Role of Antitrust Policy in an Open Economy" 1990

Seminar of the Secretary of Commerce and Industrial Development of Mexico
"Transitions to a Market Economy" 1990

Southern Economics Association
"Entry in Antitrust Analysis of Mergers" 1990
"Discussion of Strategic Investment and Timing of Entry" 1990

American Enterprise Institute Conference on Policy Approaches to the Deregulation of Network Industries
"Discussion of Network Problems and Solutions" 1990

American Enterprise Institute Conference on Innovation, Intellectual Property, and World Competition
"Law and Economics Framework for Analysis" 1990

Banco Nacional de Desenvolvimento Economico Social Lecture
"Competition Policy: Harnessing Private Interests for the Public Interest" 1990

Western Economics Association Annual Meetings
"New Directions in Antitrust from a New Administration" 1990
"New Directions in Merger Enforcement: The View from Washington" 1990

Woodrow Wilson School Alumni Colloquium
"Microeconomic Policy Analysis and Antitrust – Washington 1990" 1990

Arnold & Porter Lecture Series
"Advocating Competition" 1991
"Antitrust Enforcement" 1990

ABA Antitrust Section Convention
"Recent Developments in Market Definition and Merger Analysis" 1990

Federal Bar Association
"Joint Production Legislation: Competitive Necessity or Cartel Shield?" 1990

Pew Charitable Trusts Conference
"Economics and National Security" 1990

ABA Antitrust Section Midwinter Council Meeting
"Fine-tuning the Merger Guidelines" 1990
"The State of the Antitrust Division" 1991

International Telecommunications Society Conference
"Discussion of the Impact of Telecommunications in the UK" 1989

The Economists of New Jersey Conference
"Recent Perspectives on Regulation" 1989

Conference on Current Issues Challenging the Regulatory Process
"Innovative Pricing and Regulatory Reform" 1989
"Competitive Wheeling" 1989

Conference Board: Antitrust Issues in Today's Economy
"Foreign Trade Issues and Antitrust" 1989

McKinsey & Co. Mini-MBA Conference
"Economic Analysis of Pricing, Costing, and Strategic Business Behavior" 1989
1994

Olin Conference on Regulatory Mechanism Design
"Revolutions in Regulatory Theory and Practice: Exploring The Gap" 1989

University of Dundee Conference on Industrial Organization and Strategic Behavior
"Mergers in Differentiated Product Industries" 1988

Leif Johanson Lectures at the University of Oslo
"Normative Issues in Industrial Organization" 1988

Mergers and Competitiveness: Spain Facing the EEC
"Merger Policy" 1988
"R&D Joint Ventures" 1988

New Dimensions in Pricing Electricity
"Competitive Pricing and Regulatory Reform" 1988

Program for Integrating Economics and National Security: Second Annual Colloquium
"Arming Decisions Under Asymmetric Information" 1988

European Association for Research in Industrial Economics
"U.S. Railroad Deregulation and the Public Interest" 1987
"Economic Rationales for the Scope of Privatization" 1989
"Discussion of Licensing of Innovations" 1990

Annenberg Conference on Rate of Return Regulation in the Presence of Rapid Technical Change
"Discussion of Regulatory Mechanism Design in the Presence of Research, Innovation, and Spillover Effects" 1987

Special Brookings Papers Meeting
"Discussion of Empirical Approaches to Strategic Behavior" 1987
"New Merger Guidelines" 1990

Deregulation or Regulation for Telecommunications in the 1990's
"How Effective are State and Federal Regulations?" 1987

Conference Board Roundtable on Antitrust
"Research and Production Joint Ventures" 1990
"Intellectual Property and Antitrust" 1987

Current Issues in Telephone Regulation
"Economic Approaches to Market Dominance: Applicability of Contestable Markets" 1987

Harvard Business School Forum on Telecommunications
"Regulation of Information Services" 1987

The Fowler Challenge: Deregulation and Competition in The Local Telecommunications Market
"Why Reinvent the Wheel?" 1986

World Bank Seminar on Frontiers of Economics
"What Every Economist Should Know About Contestable Markets" 1986

Bell Communications Research Conference on Regulation and Information
"Fuzzy Regulatory Rules" 1986

Karl Eller Center Forum on Telecommunications
"The Changing Economic Environment in Telecommunications: Technological Change and Deregulation" 1986

Railroad Accounting Principles Board Colloquium
"Contestable Market Theory and ICC Regulation" 1986

Canadian Embassy Conference on Current Issues in Canadian-U.S. Trade and Investment
"Regulatory Revolution in the Infrastructure Industries" 1985

Eagleton Institute Conference on Telecommunications in Transition
"Industry in Transition: Economic and Public Policy Overview" 1985

Brown University Citicorp Lecture
"Logic of Regulation and Deregulation" 1985

Columbia University Communications Research Forum
"Long Distance Competition Policy" 1985

American Enterprise Institute Public Policy Week
"The Political Economy of Regulatory Reform" 1984

MIT Communications Forum
"Deregulation of AT&T Communications" 1984

Bureau of Census Longitudinal Establishment Data File and Diversification Study Conference
"Potential Uses of The File" 1984

Federal Bar Association Symposium on Joint Ventures
"The Economics of Joint Venture Assessment" 1984

Hoover Institute Conference on Antitrust
"Antitrust for High-Technology Industries" 1984

NSF Workshop on Predation and Industrial Targeting
"Current Economic Analysis of Predatory Practices" 1983

The Institute for Study of Regulation Symposium: Pricing Electric, Gas, and Telecommunications Services Today and for the Future
"Contestability As A Guide for Regulation and Deregulation" 1984

University of Pennsylvania Economics Day Symposium
"Contestability and Competition: Guides for Regulation and Deregulation" 1984

Pinhas Sapir Conference on Economic Policy in Theory and Practice
"Corporate Governance and Market Structure" 1984

Centre of Planning and Economic Research of Greece
"Issues About Industrial Deregulation" 1984
"Contestability: New Research Agenda" 1984

Hebrew and Tel Aviv Universities Conference on Public Economics
"Social Welfare Dominance Extended and Applied to Excise Taxation" 1983

NBER Conference on Industrial Organization and International Trade
"Perspectives on Horizontal Mergers in World Markets" 1983

Workshop on Local Access: Strategies for Public Policy
"Market Structure and Government Intervention in Access Markets" 1982

NBER Conference on Strategic Behavior and International Trade
"Industrial Strategy with Committed Firms: Discussion" 1982

Columbia University Graduate School of Business, Conference on Regulation and New Telecommunication Networks
"Local Pricing in a Competitive Environment" 1982

International Economic Association Roundtable Conference on New Developments in the Theory of Market Structure
"Theory of Contestability" 1982
"Product Dev., Investment, and the Evolution of Market Structures" 1982

N.Y.U. Conference on Competition and World Markets: Law and Economics
"Competition and Trade Policy – International Predation" 1982

CNRS-ISPE-NBER Conference on the Taxation of Capital
"Welfare Effects of Investment Under Imperfect Competition" 1982

Internationales Institut fur Management und Verwalturg Regulation Conference
"Welfare, Regulatory Boundaries, and the Sustainability of Oligopolies" 1981

NBER-Kellogg Graduate School of Management Conference on the Econometrics of Market Models with Imperfect Competition
"Discussion of Measurement of Monopoly Behavior: An Application to the Cigarette Industry" 1981

The Peterkin Lecture at Rice University
"Deregulation: Ideology or Logic?" 1981

FTC Seminar on Antitrust Analysis
"Viewpoints on Horizontal Mergers" 1982
"Predation as a Tactical Inducement for Exit" 1980

NBER Conference on Industrial Organization and Public Policy
"An Economic Definition of Predation" 1980

The Center for Advanced Studies in Managerial Economics Conference on The Economics of Telecommunication
"Pricing Local Service as an Input" 1980

Aspen Institute Conference on the Future of the Postal Service
"Welfare Economics of Postal Pricing" 1979

Department of Justice Antitrust Seminar
"The Industry Performance Gradient Index" 1979

Eastern Economic Association Convention
"The Social Performance of Deregulated Markets for Telecom Services" 1979

Industry Workshop Association Convention
"Customer Equity and Local Measured Service" 1979

Symposium on Ratemaking Problems of Regulated Industries
"Pricing Decisions and the Regulatory Process" 1979

Woodrow Wilson School Alumni Conference
"The Push for Deregulation" 1979

NBER Conference on Industrial Organization
"Intertemporal Sustainability" 1979

World Congress of the Econometric Society
"Theoretical Industrial Organization" 1980

Institute of Public Utilities Conference on Current Issues in Public Utilities Regulation
"Network Access Pricing" 1978

ALI-ABA Conference on the Economics of Antitrust
"Predatoriness and Discriminatory Pricing" 1978

AEI Conference on Postal Service Issues
"What Can Markets Control?" 1978

University of Virginia Conference on the Economics of Regulation
"Public Interest Pricing" 1978

DRI Utility Conference
"Marginal Cost Pricing in the Utility Industry: Impact and Analysis" 1978

International Meeting of the Institute of Management Sciences
"The Envelope Theorem" 1977

University of Warwick Workshop on Oligopoly
"Industry Performance Gradient Indexes" 1977

North American Econometric Society Convention
"Intertemporal Sustainability" 1979
"Social Welfare Dominance" 1978
"Economies of Scope, DAIC, and Markets with Joint Production" 1977

Telecommunications Policy Research Conference
"Transition to Competitive Markets" 1986
"InterLATA Capacity Growth, Capped NTS Charges and Long Distance Competition" 1985
"Market Power in The Telecommunications Industry" 1984
"FCC Policy on Local Access Pricing" 1983
"Do We Need a Regulatory Safety Net in Telecommunications?" 1982
"Anticompetitive Vertical Conduct" 1981
"Electronic Mail and Postal Pricing" 1980
"Monopoly, Competition and Efficiency": Chairman 1979
"A Common Carrier Research Agenda" 1978
"Empirical Views of Ramsey Optimal Telephone Pricing" 1977
"Recent Research on Regulated Market Structure" 1976
"Some General Equilibrium Views of Optimal Pricing" 1975

National Bureau of Economic Research Conference on Theoretical Industrial Organization
"Compensating Variation as a Measure of Welfare Change" 1976

Conference on Pricing in Regulated Industries: Theory & Application
"Ramsey Optimal Pricing of Long Distance Telephone Services" 1977

NBER Conference on Public Regulation
"Income Distributional Concerns in Regulatory Policy-Making" 1977

Allied Social Science Associations National Convention
"Merger Guidelines and Economic Theory" 1990
Discussion of "Competitive Rules for Joint Ventures" 1989
"New Schools in Industrial Organization" 1988
"Industry Economic Analysis in the Legal Arena" 1987
"Transportation Deregulation" 1984
Discussion of "Pricing and Costing of Telecommunications Services" 1983
Discussion of "An Exact Welfare Measure" 1982
"Optimal Deregulation of Telephone Services" 1982
"Sector Differentiated Capital Taxes" 1981
"Economies of Scope" 1980
"Social Welfare Dominance" 1980
"The Economic Definition of Predation" 1979
Discussion of "Lifeline Rates, Succor or Snare?" 1979
"Multiproduct Technology and Market Structure" 1978
"The Economic Gradient Method" 1978
"Methods for Public Interest Pricing" 1977
Discussion of "The Welfare Implications of New Financial Instruments" 1976
"Welfare Theory of Concentration Indices" 1976
Discussion of "Developments in Monopolistic Competition Theory" 1976
"Hedonic Price Adjustments" 1975
"Public Good Attributes of Information and its Optimal Pricing" 1975
"Risk Invariance and Ordinally Additive Utility Functions" 1974
"Consumer's Surplus: A Rigorous Cookbook" 1974

University of Chicago Symposium on the Economics of Regulated Public Utilities
"Optimal Prices for Public Purposes" 1976

American Society for Information Science
"The Social Value of Information: An Economist's View" 1975

Institute for Mathematical Studies in the Social Sciences Summer Seminar
"The Sustainability of Natural Monopoly" 1975

U.S.-U.S.S.R. Symposium on Estimating Costs and Benefits of Information Services
"The Evaluation of the Economic Benefits of Productive Information" 1975

NYU-Columbia Symposium on Regulated Industries
"Ramsey Optimal Public Utility Pricing" 1975

Research Seminars:

Bell Communications Research (2)
Bell Laboratories (numerous)
Department of Justice (3)
Electric Power Research Institute
Federal Reserve Board
Federal Trade Commission (4)
Mathematica
Rand
World Bank (3)
Carleton University
Carnegie-Mellon University
Columbia University (4)
Cornell University (2)
Georgetown University
Harvard University (2)
Hebrew University
Johns Hopkins University (2)
M. I. T. (4)
New York University (4)
Northwestern University (2)
Norwegian School of Economics and Business Administration
University of California, San Diego
University of Chicago
University of Delaware
University of Florida
University of Illinois
University of Iowa (2)
Universite Laval

University of Maryland
University of Michigan
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S.U.N.Y. Albany

(29)

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No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF RESPONDENT

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Question Presented for Review

Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?

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BRIEF OF *AMICUS CURIAE* AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF RESPONDENT

July 22, 2003

Statement of Interest[1]

The American Antitrust Institute ("AAI") is an independent, not-for-profit organization dedicated to economic research, the study of the antitrust laws, and public education. The directors of the AAI, Jonathan Cuneo, Esq., Albert H. Foer, Esq., and Professor Robert Lande of the University of Baltimore Law School, authorized this filing. The Advisory Board of the AAI consists of 62 prominent lawyers, law professors, economists and business leaders (the members of the Advisory Board are listed on the AAI web site: www.antitrustinstitute.org). The members of the Advisory Board serve in a consultative capacity and their individual views may differ from the positions taken by the AAI. The AAI's mission is to increase the role of competition and sustain the vitality of the antitrust laws.

The AAI has several concerns. First, this case reaches to the heart of how antitrust law should function in newly deregulated industries undergoing a transition from state-sanctioned monopolistic markets to competitive ones. Such transitions are likely to be resisted by incumbent monopolists and other entrenched interests, and antitrust law is well-suited to redress and deter conduct which may

[1]The parties to this action have lodged blanket consents to the filing of *amicus* briefs with the Clerk of Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no persons other than the AAI or its counsel have made a monetary contribution to the preparation or submission of this brief.

frustrate or delay the emergence of competitive markets. In the context of such a transition, it is both unnecessary and unhelpful to insist that the antitrust laws must be suspended until the transition is by some measure "complete." The scope of antitrust law should not be artificially limited in a manner that inhibits it from accommodating the new factual circumstances created by deregulation. When particularly egregious conduct threatens to derail progress toward competition, or to deny consumers of the benefits of newly competitive markets, the federal courts should be empowered to intervene. *See* A.A. Foer & D.L. Moss, *Electricity in Transition: Implications for Regulation and Antitrust*, 24 Energy L.J. 89 (2003).

Second, the AAI is concerned with the preservation of well-settled principles of antitrust law as they apply to transitional as well as in more traditional contexts. In particular, the AAI urges this Court to refrain from eviscerating the essential facilities or monopoly leveraging doctrines by interposing unreasonably burdensome requirements of pleading or proof.

Finally, the AAI believes that any decision of this Court should take full cognisance of the procedural posture of the instant case, *i.e.*, that a motion to dismiss is under review without the benefit of the development of a factual record.

Summary of the Argument

The AAI as *amicus curiae* argues herein that the amended complaint in this case both asserts a legally cognizable claim and alleges sufficient facts to support that claim. AAI therefore urges affirmance of the court of appeals' decision reversing the Order and Opinion of the district court granting petitioner's motion to dismiss respondent's civil antitrust claim.

The Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 *et seq.* ("1996 Act" or the "Act"), requires that monopoly incumbent local exchange carriers ("ILECs") provide certain services to competitive local exchange carriers ("CLECs"), particularly "interconnection" with their local networks on terms that are "just, reasonable and non-discriminatory" so that CLECs can compete with ILECs in existing and emerging telecommunications markets. 47 U.S.C. § 251. The 1996 Act establishes a set of procedures for making and enforcing "interconnection agreements" between ILECs and CLECs for access to local networks. 47 U.S.C. § 252.

Respondent brought suit under Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15(a), alleging that petitioner caused antitrust injury by failing to fulfill its duties under its interconnection agreement with the CLEC of which respondent was a customer.

1. Respondent's antitrust claim is cognizable notwithstanding the regulatory scheme established in the 1996 Act. Although precedent exists for insulating exclusionary conduct from antitrust liability because of the market effects of economic regulation, this principle does not apply to the case at bar. No regulatory "necessity" or "approval" can be raised to justify or excuse petitioner's alleged anticompetitive conduct. In fact, the market effect of the 1996 Act is to expand the scope of competition. As a result, the duties of an ILEC to refrain from anticompetitive conduct are correspondingly enlarged. By introducing new areas of competition, the 1996 Act widens the scope for conduct that offends the requirements of the antitrust laws. The introduction of competition thus creates an additional area in which one must refrain from anticompetitive conduct. This factual circumstance is entirely consistent with the express antitrust savings clause in the Act, 47 U.S.C. §152, note, 110 Stat. 56, 143 (1996), which forecloses

any finding of antitrust immunity.

As it pertains to the local exchange market, the primary purpose of the 1996 Act is to effect a transition from a monopolistic market to a competitive one. Concurrent application of the antitrust laws and the 1996 Act will promote this transition. Moreover, well-settled principles of statutory construction require that where two statutes cover the same subject area, both should be given effect to the maximum extent possible. Because there is no "positive repugnancy" between the antitrust laws and the 1996 Act, the two statutes should be applied in a complimentary manner.

Permitting respondent to prosecute its claim will not affect the scope of affirmative duties required of a monopolist to deal with its rivals under existing antitrust principles. Petitioner's duty to grant access to requesting CLECs arises under the 1996 Act and not under the antitrust laws. Nonetheless, petitioner continues to be subject to a negative duty to refrain from conduct that frustrates the pro-competitive provisions of the Act. Affirmance in the instant case would not create precedent for the expansion of antitrust duties of a monopolist to deal with its rivals; it would, however, support the proposition that interference with a statutorily mandated introduction of competition can provide the factual basis for an antitrust claim.

Reformulation of the essential facilities or monopoly leveraging doctrines, as urged in particular by the government in its brief as *amicus curiae*, is unwarranted. Requiring a Section 2 claimant to establish that a defendant's conduct rises to the level of economic irrationality in order to plead a claim under these theories would serve no useful purpose. These well-established doctrines already subsume the kind of exclusionary and anticompetitive conduct prohibited by Section 2. No claimant should be saddled with pleading and proving a

negative fact in order to establish exclusionary conduct. If some claim of a consumer benefit can be made, or there is some reason why a defendant's exclusionary conduct is not overly restrictive, it is for the defendant and not the plaintiff to bear the burden of going forward with evidence to that effect.

2. The amended complaint alleges a violation of Section 2 of the Sherman Act because it sufficiently articulates the elements of such a claim. Respondent alleges that petitioner breached its duties under its interconnection agreement with respondent's CLEC by filling its own orders ahead of those of the CLEC's customers, delaying orders, and "making it difficult for its competitors to provide service in the Local Phone Service market on the level that [it] is able to provide to its customers in that market." Am. Compl. ¶¶ 21, 52. Respondent asserts that this breach was without any valid business purpose. These statements are sufficient to place petitioner on notice of the nature of the claim. Dismissal of the claim because of the absence of specific language or phraseology is contrary to the essential requirements of law.

In particular, petitioner urges that the amended complaint is deficient because it fails to allege that petitioner's conduct would make no economic sense but for its tendency to perpetuate petitioner's monopoly. But, it could not be otherwise: There can be no legitimate economic rationale for breaching a statutorily mandated interconnection agreement. No consumer will purchase telephone service from a provider who cannot connect them to all other users on the network. The breach of an interconnection agreement, therefore, makes competition impossible. By the very nature of the industry, a breach of an interconnection agreement forestalls the transition to competition contemplated by the Act and perpetuates petitioner's monopoly.

Argument

The district court below granted petitioner's motion under Fed.R.Civ.P. 12(b)(6) to dismiss respondent's private antitrust claim. *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 123 F.Supp.2d 738, 742 (S.D.N.Y., 2000). The Second Circuit Court of Appeals reversed. 305 F.3d 89 (2nd Cir., 2002) ("*Trinko*"). This Court granted *certiorari* solely for review of the Question Presented. *Sub nom., Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, ___ U.S. ___, 123 S.Ct. 1480, 155 L.Ed.2d 224 (2003).

Fed.R.Civ.P. 12(b)(6) codifies the common law plea of demurrer, *i.e.*, that the complaint fails "to state a claim upon which relief can be granted." It tests the legal sufficiency of the claim, to screen out lawsuits "that are fatally flawed in their legal premises and destined to fail * * *." *Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc.*, 988 F.2d 1157, 1160 (Fed.Cir., 1993). Dismissal under the Rule is warranted when a claim either *i*) asserts a legal theory that is not cognizable as a matter of law, or *ii*) fails to allege sufficient facts to support a cognizable legal claim.

It is axiomatic that the standard of review requires accepting the allegations in the complaint as true, and affirming dismissal of the claim

> only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hinshon v. King & Spalding*, 467 U.S. 69, 73, (1984), *accord, Trinko*, supra, 309 F.3d 71 (Sack, J., concurring in part and dissenting in part) and *Covad Communications Co. v. Bell Atlantic Corp.*, 201 F.Supp.2d 123, 128 (D.D.C., 2002)("*Covad-Bell Atlantic*").

Summary disposition of an antitrust case before the plaintiff has had the opportunity for discovery, as this Court has noted, "should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976). Only if "'it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief,'" is the claim not cognizable as a matter of law. *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957))[emphasis added]. This rule applies with no less force to a Sherman Act claim. *Ibid*, 444 U.S. at 246.

I.
RESPONDENT'S ANTITRUST CLAIM IS COGNIZABLE NOTWITHSTANDING THE REGULATORY SCHEME ESTABLISHED IN THE TELECOMMUNICATIONS ACT OF 1996

Typically, the issue of whether an antitrust claim against a defendant subject to market-regulating legislation is cognizable depends on whether the offending conduct is expressly or impliedly immune from antitrust scrutiny on account of the regulatory scheme.[2] In the present case,

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[2] *See, e.g., Nat'l Railroad Passenger Corp v. Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453 (1974)(interstate railroads); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)(trucking); *Maryland & Virginia Milk Producers Ass'n v. U.S.*, 362 U.S. 458 (1960)(milk production); *U.S. Navigation Co., Inc. v. Cunard S.S. Co., Ltd.*, 284 U.S. 474 (1932)(maritime shipping); *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963)(banking); *U.S. v. Radio Corp. of America*, 358 U.S. 334 (1959)(broadcasting); *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973)(electricity wholesaling); *California v. FPC*, 369 U.S. 482 (1962)(natural gas); *Nat'l Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981)(health care); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993)(insurance); *Pan*

(continued...)

however, the express antitrust savings clause in the 1996 Act forecloses antitrust immunity.[3] 47 U.S.C. §152, note, 110 Stat. 56, 143 (1996), *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir., 2000). As the *Goldwasser* court stated, "Our principal holding is * * * not that the 1996 Act confers implied immunity * * *. Such a conclusion would be troublesome at best given the antitrust savings clause in the statute." 222 F.3d, at 401. Despite this, the *Goldwasser* court nonetheless found that the antitrust claim before it was not cognizable, *accord, Cavalier Tel. Co. v. Verizon Va., Inc.*, No. 02-1337, 2003 WL 21153305 (4th Cir., May 20, 2003). One interpretation of the *Goldwasser* decision limits its applicability to the particular complaint before that court, the dismissal of which is attributable to the plaintiff's failure to allege sufficient facts. However, numerous lower courts, including the district court in the present case, have relied on *Goldwasser* as authority for the proposition that antitrust claims against incumbent local telephone carriers must be dismissed as a matter of law.[4]

At least three legal avenues other than implied immunity

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[2](...continued)
American World Airways, Inc., v. United States, 371 U.S. 296 (1963), *Hughes Tool Company v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973)(air transport); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975)(securities).

[3]The Senate Report analyzing the bill specifically provided: "[T]he provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill." S. Rep. No. 104-23, at 17 (1995) (R2-7-A18).

[4]*See Covad-Bell Atlantic, supra* (collecting cases). However, the Second Circuit in the instant case, the Eleventh Circuit in *Covad Communications Co., et al. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir.), *reh'g den.*, 314 F.3d 1272 (2002)("*Covad-BellSouth*"), and the Ninth Circuit in *MetroNet Services Corporation v. USWest Communications*, 325 F.3d 1086 (9th Cir., 2003) have taken the opposite view.

may bar an antitrust claim in the context of a regulated industry. First, the so-called "filed rate doctrine," adopted by this Court in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922) and reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), bars antitrust claims which seek remedies that are incompatible with the rate approval process of a regulatory agency.

Second, the doctrine of "primary jurisdiction" requires a district court to defer an antitrust claim where the case "requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Ricci v. Chicago Merc. Exch.*, 409 U.S. 289 (1973). "[I]n such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. Western Pacific R. Co.* 352 U.S. 59, 64 (1956), citing *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940).

Finally, limitations on the cognizability of antitrust claims against regulated entities may arise from the alteration of the market environment induced by regulation. Thus, in *Town of Concord, Ma. v. Boston Edison Co.*, 915 F.2d 17 (1st Cir., 1990), *cert. denied*, 499 U.S. 931 (1991), the court of appeals did not say either that the antitrust laws did not apply to the electrical wholesale market or that they applied less stringently, but rather that the regulatory scheme itself made "a critical difference in terms of antitrust harms, benefits, and administrative considerations." 915 F.2d, at 23. Similarly, as then-judge Kennedy wrote in *Phonetele, Inc., v. American Telephone and Telegraph Company*, 664 F.2d 716, 737 (1981), "While a given regulatory scheme may not amount to the degree of necessity required to confer implied immunity on all activities of a regulated entity, some degree of necessity may be established as a matter of fact in individual cases." *See also Otter Tail, supra*, note 2.

Goldwasser, by contrast, does not rely on the "fact-based" inquiry into the relationship between regulation and antitrust suggested by *Town of Concord* and *Phonetele*. The regulatory scheme in the Act does not alter the market in a way that supports a bar to respondent's claim. In fact, just the opposite: The pro-competitive changes in the market induced by the 1996 Act have altered the market in such a way as to *support* respondent's antitrust claim. Moreover, the antitrust remedies sought by respondent do not conflict in a manner analogous to the conflict with administrative rate-setting that underlies the filed rate doctrine. That doctrine is inapposite here, and to the extent *Goldwasser* relied on the filed rate doctrine to affirm the dismissal of the complaint in that case, it erred.

A. The 1996 Act Does Not Insulate Petitioner's Conduct from Antitrust Scrutiny.

The fact-based rationale underlying both *Town of Concord*, *supra*, and the filed rate doctrine of *Keogh* and *Square D*, *supra*, is straightforward: Antitrust analysis depends on specific market conditions which, in turn, depend on applicable economic regulation. Under both doctrines, a Section 2 Sherman Act claim cannot survive when regulatory oversight sufficiently reduces the likelihood that alleged anticompetitive conduct will result in the requisite exclusionary effect. But, such "transactional immunity" for conduct that might otherwise violate the antitrust laws requires specific and intimate supervision of the challenged conduct by the regulatory agency. In the present case, no comparable regulatory oversight exists to attenuate the exclusionary effect of petitioner's alleged breach of its interconnection duties.

Admittedly, the 1996 Act establishes elaborate procedures for negotiating and implementing interconnection agreements between ILECs and CLECs. The procedural

role for regulators under the Act, however, plainly does not extend to overseeing or supervising an ILEC's performance of its contractual interconnection duties. Nor does the Act provide an on-going oversight mechanism intended to prevent the challenged conduct. Requiring ILECs to enter into interconnection agreements presupposes that such agreements will be honored by the subscribing parties. The failure to abide by such an agreement can in no way be justified by any of the procedures in the Act. There can be no inference that the alleged misconduct arises out of any regulatory "necessity" or "approval." The "factual justification" which excused arguably anticompetitive conduct by the defendants in *Town of Concord* and *Square D*, therefore, is entirely absent in the present case.

The present case is thus analogous to *U.S. v. Radio Corp. of America, supra*, note 2, where this Court held that the antitrust laws apply to television broadcasters despite the "pervasive regulation" of the industry by the FCC. Indeed, that case represents an even more extreme example of a regulatory scheme co-existing with antitrust enforcement. Even in the face of express FCC approval, broadcasters were still not shielded from antitrust liability for mergers with anticompetitive effects. The Second Circuit Court of Appeals in the case at bar, together with the Eleventh Circuit in *Covad-BellSouth, supra*, note 4, and the Ninth Circuit in *MetroNet, supra*, note 4, firmly rejected the proposition that an antitrust claim is barred as a matter of law "on the basis of an allegation of anti-competitive conduct that happens to be 'intertwined' with obligations established by the 1996 Act," *Covad-BellSouth, supra*, note 4, 314 F.3d, at 1282, or because the antitrust claim was "inextricably linked" to allegations that section 251 of the Telecommunications Act has been violated, *Trinko, supra*, 305 F.3d, at 109.

B. The 1996 Act Expands the Scope of Competition and also an Incumbent's Duty to Refrain from Anticompetitive Conduct.

The analytical framework of *Town of Concord*, however, does more than defeat any claimed justification for petitioner's alleged anticompetitive conduct. If a statute that serves to replace competition with governmental control is a "fact of market life" which can alter the "antitrust harms, benefits, and administrative considerations" pertaining to the conduct of a regulated entity, so too should a statute which replaces governmental control with competition. The clear purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework * * * by opening all telecommunications markets to competition * * *." H.R.Conf.Rep. No. 104-458, at 1 (1996). The Act thus turns the typical regulatory scheme on its head by replacing monopolistic markets with competitive ones. Such deregulatory legislation also inverts the analysis in *Town of Concord*. Newly competitive markets give rise to new factual circumstances, which, in turn, give rise to new opportunities for the violation of the antitrust laws.

This result does not depend on any "modification" of the antitrust laws, which would be expressly prohibited by the savings clause. The introduction of a competitive environment, however, does create an additional area in which one must refrain from antitcompetitive conduct. Even allowing that "conduct that did *not* violate antitrust law prior to the 1996 Act does not now violate antitrust law after the Act" (*Covad-Bell Atlantic, supra*, 201 F.Supp.2d, at 131), a competitive environment in the local exchange market was created by the Act which simply did not exist before. Once the Congressionally mandated interconnection agreements are in place, parties to those agreements should be held to account for the natural consequences of their breach, including any anticompetitive effects. The

successful emergence of competition critically depends on the faithful performance of these agreements, in the absence of which the intent of the statute and competition-in-fact is frustrated.

The analysis in *Goldwasser* and *Covad-Bell Atlantic* cannot be reconciled with the alteration in market conditions engendered by the 1996 Act. By requiring that the plaintiff's allegations in that case "be divorced from its 1996 Act context such that it states a freestanding antitrust claim for Rule 12(b)(6) purposes," (*Goldwasser*, *supra*, 222 F.3d, at 401) the *Goldwasser* court created an insurmountable pre-condition. No antitrust claim can be divorced from the conditions in the relevant market. The fact that those conditions are a creature of the 1996 Act does not transform preexisting duties to refrain from exclusionary or anticompetitive conduct rooted in the antitrust laws into statutory duties that arise solely from the unique provisions of the 1996 Act. The obvious fact that without the interconnection agreement required by the Act petitioner would face no antitrust liability for its breach in no way vitiates the gravamen of respondent's claim.

C. Concurrent Application of the 1996 Act and the Antitrust Laws Will Promote the Transition to Competition.

Preclusion of respondent's claim is inconsistent with the transition of the local exchange market from monopoly to competition in yet another respect. The intended end result is a competitive local exchange market to which antitrust law fully applies. Any bar to antitrust relief for anticompetitive conduct by an ILEC in connection with its statutory duties to assist rivals, therefore, must, at some point, come to an end. When should such a moratorium be lifted?

In *Goldwasser*, the court takes the view that a private antitrust claim will not lie until local telephony becomes sufficiently competitive, as evidenced by some future administrative or legislative act that "dismantles" the local exchange provisions of the 1996 Act. According to *Goldwasser*, the Act's antitrust savings clause does not authorize applying the antitrust law to the local telephone market because the local market is unlike

> many markets within the telecommunications industry that are already open to competition and that are not subject to the detailed regulatory regime we have been discussing; as to those, the antitrust savings clause makes it clear that antitrust suits may be brought today. At some appropriate point down the road, the FCC will undoubtedly find that local markets have also become sufficiently competitive that the transitional regulatory regime can be dismantled and the background antitrust laws can move to the fore. * * * [T]his is not what Congress has mandated at this time for the ILEC duties that are the subject of the Goldwasser complaint. *Goldwasser*, 222 F.3d, at 401-02.

Unfortunately, no legal authority was cited to support this distinction between those markets to which the savings clause should apply and those to which it should not. Nor is there any evidence that Congress intended a consecutive application of the Act followed at some later time by the antitrust laws. Indeed, the legislative history reveals that Congress intended that the antitrust laws and the local telephony deregulatory provisions of the Act apply concurrently and in a complimentary manner. The conference committee stated that the savings clause "prevents affected parties from asserting that the bill

impliedly preempts other laws." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, S. Rep. No. 104-230, at 201 (1996). Similarly, the continued vitality of the antitrust laws in the telecommunications industry was commended in statements made by Representative Conyers and Senators Thurmond and Leahy.[5]

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[5] Antitrust law is synonymous with low prices and consumer protection–and that is exactly what we need in our telecommunications industry * * *. [T]he bill contains an all-important antitrust savings clause which ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws * * *. And by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers. *Covad-BellSouth*, *supra*, note 4, 314 F.3d, at 1281, *quoting*, 142 Cong. Rec. H1145-06 (daily ed. February 1, 1996)(statement of Rep. Conyers).

The second important antitrust issue in this legislation is the unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Today we take for granted that the antitrust laws apply to the communications sector * * *. Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation that it fosters, can flourish to benefit consumers and the economy. *Id.*, *quoting*, 142 Cong. Rec. S687-01 (daily ed. February 1, 1996) (statement of Sen. Thurmond).

I firmly believe that we must rely on the bipartisan principles of antitrust law in order to move as quickly as possible toward competition in all segments of the telecommunications industry, and away from regulation. Relying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry. *Id.*, *quoting*, 141 Cong. Rec. S18586-01 (daily ed. December 14, 1995) (statement of Sen. Leahy).

The *Goldwasser* decision and the cases that follow it rule out *ex ante* any complementarity between the two legal regimes. This "either-or" approach to the monopoly-to-competition transition of the local exchange market violates a "cardinal principle" of statutory construction, explicated by this Court in *U.S. v. Borden, Co.*, 308 U.S. 188 (1939):

> When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * The intention of the legislature to repeal 'must be clear and manifest'. It is not sufficient as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 10 L.Ed. 987, 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary'. There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'. 308 U.S., at 198–199 [citations omitted].

Accord, Silver v. New York Stock Exchange, supra, note 2 (applying the *Borden* test in the antitrust context).

By contrast, the apparent construction given by the *Goldwasser* court to the antitrust laws and the 1996 Act *in pari materia* is that "[t]he 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field." 222 F.3d, at 401. In the absence of the requisite "positive repugnancy," such a construction violates the plainly stated rule in *Borden*.

To establish such repugnancy, petitioner, following *Goldwasser*, argues that a private antitrust claim in the

circumstances at bar is irreconcilable with the 1996 Act because the latter places exclusive control of the monopoly-to-competition transition in the hands of the FCC and the state utility commissions. A party would be able, by the simple act of filing an antitrust suit, to transfer that task to the federal courts.[6] But, permitting respondent's claim to proceed will have no such effect, and petitioner fails to go beyond the mere assertion that it will. The regulatory scheme established by Congress will not be "wiped away" by the filing of a private antitrust claim in the present circumstances.

Certainly, not all conceivable antitrust claims can be reconciled with the procedures established under the 1996 Act as can the case at bar. For example, a competitive carrier dissatisfied with the outcome of interconnection negotiations regulated by the Act should not be permitted to sidestep those regulatory procedures by filing an antitrust action. Should such a claim reach adjudication by a district court, petitioner's dire prognostications may very well come true. But, this is not such a case. In this case, the regulation has come to an end-point, in the sense that the procedures of the Act related to introducing competition have been successfully implemented. In the absence of petitioner's alleged recalcitrance in fulfilling its interconnection duties, the quantum of competition intended by the statute would exist unimpeded. Respondent's claim seeks no reform of the negotiated interconnection duties, or any alteration of their scope or terms. The claim simply seeks a remedy for interference

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[6] There would, in short, be no escaping the imposition of novel and inappropriate regulatory tasks on antitrust judges and juries if Section 2 were now expanded to embrace respondent's claim. Antitrust judges and juries would become the shadow, omnipresent regulators of the telecommunications industry—even more than the district court that supervised the Bell breakup decree. Pet. Br., at 34.

with competitive arrangements which the Act has already established. In these circumstances, no opportunity exists for the district court to act as regulator, or for juries to substitute their judgment about the nature or scope of the competitive arrangements mandated by the Act.

The application of the antitrust laws in an environment in which the competitive relationships among the parties have been fully settled serves the useful purpose of identifying conduct which, if permitted, would be so egregious as to threaten the transition to and the viability of statutorily-mandated competition. Moreover, respondent's claim provides a remedy for those consumers injured when the pro-competitive purposes of the Act have been undermined. *See Long Lake Energy Corporation v. Niagara Mohawk Power Corporation*, 700 F.Supp. 186, 188-9 (S.D.N.Y., 1988) ("Although * * * there are a host of agency proceedings now underway * * * these agencies do not have the power to grant the relief sought in this action, treble damages for alleged violations of the antitrust laws and a broad injunction against further anticompetitive acts.") Antitrust law can and should prevent the transition to a competitive environment from backsliding in the face of conduct of the type alleged by respondent.

D. Respondent's Claim Will Have No Effect on the Scope of Affirmative Duties Required of a Monopolist Under Existing Antitrust Principles.

Respondent's claim involves no novel extension of the affirmative duties required of a monopolist as they presently exist under Section 2 of the Sherman Act. Such an expansion of the scope of Section 2 does not follow from the cognizability of respondent's claim. The scope and terms of access which petitioner is required to grant under any given interconnection agreement are not issues that require adjudication in any antitrust litigation. The fact that the

1996 Act imposes duties that "go well beyond anything the antitrust laws would mandate on their own," *Goldwasser, supra*, 222 F.3d, at 400, does not nullify the *negative* duties in the antitrust law to *refrain* from actionable anticompetitive conduct. Certainly, the *Goldwasser* court is correct to decline "to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws." 222 F.3d, at 401. But, just as certainly, an antitrust violation that happens also to involve a failure to comply with an interconnection agreement required by the Act does not imbue the antitrust laws with additional duties that stem from the statute.

Indeed, if respondent's duties to grant access to its CLEC counterparties arise under its interconnection agreements and not under the antitrust laws, as petitioner asserts, there would be little or no precedential effect on the scope of the essential facilities or monopoly leveraging doctrines from a decision by this Court that petitioner's alleged interference with the pro-competitive arrangements of the Act are actionable under the antitrust laws. Such a holding would not support a claim that antitrust principles have been expanded by this Court so as to encompass the more exacting duties imposed by the statute.

Affirmance in this case would lend support, however, to the proposition that the failure to perform statutory duties designed to promote a transition to competition in the marketplace—when accompanied by the other requisite elements of a Section 2 offense—may form the factual basis of a viable antitrust claim.

It is puzzling, therefore, that both petitioner and the United States and the Federal Trade Commission as *amici curiae* devote so much argumentation to the issue of the extent to which a monopolist ought to be compelled to share resources or grant access to rivals. Petitioner urges that "respondent's proposed Section 2 duty to provide rivals

adequate affirmative assistance * * * reduces the incentives that antitrust law centrally encourages" and "creates significant costs of implementation." Pet. Br., at 27-8. Similarly, the government argues that

> courts should be hesitant to impose a duty to assist rivals. The decisions of a seller, even a monopolist, regarding to whom it will sell, on what terms, and under what sort of quality and purchaser-satisfaction measures, generally reflect its own assessment of how to compete and provide goods most effectively in the marketplace. U.S. Br., at 20.

In the same vein, the government argues that affirmance in this case "would fundamentally transform the Sherman Act" so that monopolists would have to "pull their competitive punches, assist their competitors, convert themselves from retailers into wholesalers, and share monopoly profits on demand." U.S. Br., at 30.

But these issues—the scope and terms of access to the local exchange network—have all been settled in the context of the Act, and are beyond the reach of respondent's claim. The appropriate forum before which to voice objections to the interconnection obligations established by the Act is the Congress, not before this Court in the context of an antitrust claim seeking redress for the anticompetitive effects of petitioner's alleged failure to abide by established legal requirements.

E. Reformulating the Pleading or Proof Requirements of a Section 2 Claim Based on the Essential Facilities or Monopoly Leveraging Doctrines is Unwarranted.

The petitioner's conditional duties to provide access to certain of its local exchange facilities arises out of the 1996

Act and not out of Section 2 of the Sherman Act. Because of this, the scope or continued validity of either the essential facilities or monopoly leveraging doctrines of Section 2 are inapposite in the present case. Despite the irrelevance of such issues, however, a radical reformulation of these doctrines is urged by petitioner and the government in their respective briefs. Such a reformulation of these doctrines is entirely unwarranted.

Both theories are fully consistent with leading decisions of this Court upholding liability under Section 2 based on exclusionary or anticompetitive conduct. With respect to the essential facilities doctrine, in the exceptional circumstances in which access to a truly essential facility is necessary for the very existence of competition, the imposition of an affirmative duty to deal based on Section 2 is entirely consistent with such decisions as *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985) and *Otter Tail Power Co. v. U.S., supra*, note 2. *See* Pitofsky, R., *et al., The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70:2 Antitrust L.J., 443 (2002). The suggestion by the court of appeals below that respondent's claim could be couched in terms of the essential facilities doctrine does not somehow "dispense with" the exclusionary conduct requirement of Section 2. U.S. Br., at 20. As the Ninth Circuit described it,

> When a firm's power to exclude rivals from a facility gives the firm the power to *eliminate* competition in a market downstream from the facility, and the firm excludes at least some of its competitors, the danger that the firm will monopolize the downstream market is clear. In this circumstance, a finding of monopolization, or at least attempted monopolization, is appropriate and there is little need to engage in the usual lengthy analysis of factors such as intent. *Alaska*

> *Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d. 536, 546 (9th Cir., 1991) [emphasis in original].

Thus, the exclusion of competition lies at the very heart of the essential facilities doctrine. The government urges, however, that more than the mere exclusion of competition should be required. In particular, it is urged not only that the denial of access to an essential facility be exclusionary, but also, citing *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986), "economically irrational for the monopolist but for the conduct's adverse impact on competition." U.S. Br., at 16. Such a standard is wholly inappropriate in the context of a claimed exclusionary denial of an essential facility.

The reason can be traced directly to the circumstances of the *Matsushita* case itself, in which this Court adopted the skepticism of Chicago School economic scholars, who stressed the implausibility of predatory pricing as a profitable anticompetitive scheme. The combination of the short-term benefits of lower prices for consumers and the perceived implausibility that predatory pricing can be a successful anticompetitive strategy led to the exercise of extreme caution in predatory pricing cases in the form of a severely strict standard of exclusionary or predatory behavior.

However, the factors that led this Court to raise the bar in predatory pricing cases are entirely absent from a provable Section 2 claim based on an essential facilities theory, so such extreme caution is unwarranted. It is sufficient that a defendant be given an opportunity to establish that any harm to competition is not disproportionate to the benefits that may accrue to consumers from denying access to an essential facility, or that superior efficiencies or other pro-competitive justifications outweigh any anticompetitive effects. To require a claimant to establish the "economic

irrationality" of a defendant's conduct in an essential facilities case as part of its case-in-chief goes far beyond anything that may be necessary to prevent the unjust result that a competitor is held to task under the antitrust laws for what may be essentially pro-competitive conduct.

Similarly, the government makes the same demand for a *prima facie* showing of economic irrationality before a claimant may establish a Section 2 claim based on a theory of monopoly leveraging, U.S. Br., at 26. This doctrine is also consistent with longstanding decisions of this Court, such as *U.S. v. Griffith*, 334 U.S. 100 (1948) and *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). There is no rationale for such a severe standard in a monopoly leveraging case. As this Court made abundantly clear in *Spectrum Sports, supra*, 506 U.S., at 456, as long as a "dangerous probability of monopolization" by a defendant can be established, the exclusionary conduct element has been satisfied.

Finally, aside from the fact that such issues are fundamentally unrelated to the ultimate nature of respondent's claim in the instant case, and irrespective of the merits of the government's desire to reformulate *all* Section 2 cases in the image of *Matsushita*, such judicial revisionism is not appropriate in the context of a motion to dismiss. Even if this Court is inclined to yield to the government's exhortations to dramatically alter the jurisprudence of Section 2, it should only do so based on a fully developed factual record, and not in the procedural posture of the present case, in which the only issue is whether respondent has pled sufficient facts to proceed to gather proof that petitioner has violated the law.[7]

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[7]The essential facilities cases cited above, for example, apply to vertically related markets, in which control of an upstream input acts as the "gateway" to a downstream market. Under the 1996 Act and FCC

(continued...)

II.
THE AMENDED COMPLAINT ALLEGES A VIOLATION OF SECTION 2 OF THE SHERMAN ACT.

The fundamental elements of a claim for violation of Section 2 of the Sherman Act have been elaborated upon by this Court on numerous occasions:

> 'The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992), *quoting United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966), *accord Goldwasser, supra*, 222 F.3d, at 396-7.

Thus, having a monopoly does not by itself violate Section 2; a defendant must have engaged in improper exclusionary acts to acquire or maintain its monopoly power, *see United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2nd Cir., 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins."). "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which

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[7](...continued)
regulations, wholesale interconnection to the local loop is a separate relevant market from retail telephone service. The instant case thus fits squarely into the doctrine as a matter of law. At the very least, market definition is a factual inquiry that is not amenable to summary adjudication on a motion to dismiss.

unfairly tends to destroy competition itself." *Spectrum Sports, supra*, 506 U.S., at 458. However, as this Court observed in *Spectrum Sports*, "It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects." 506 U.S., at 458-9.

In the analysis of conduct

> it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on [the defendant's] smaller rival, and on [the defendant] itself. *Aspen Skiing Company v. Aspen Highlands Skiing Corp.*, 472 U.S., at 605, *quoting* R. Bork, *The Antitrust Paradox* 138 (1978) [footnote omitted].

A. The Amended Complaint Articulates the Elements of a Claim Under Section 2 of the Sherman Act.

The amended complaint states sufficient facts to allege a cause of action under Section 2 of the Sherman Act under the foregoing standards. The amended complaint alleges that at the time material to the claim, petitioner had monopoly power with respect to local telephone service in the relevant geographic market, defined to be "those areas in which [petitioner] is the ILEC, *viz.*, most of or all of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, the District of Columbia, and those portions of Connecticut and other states in which

[petitioner] is the ILEC." Am. Compl., ¶¶10, 48. Furthermore, the amended complaint alleges that petitioner

> has engaged in exclusionary and anticompetitive behavior by, *inter alia*, attempting to exclude or reduce the market share of rivals in the Local Phone Service [market] on a basis other than efficiency, i.e., by making it difficult for its competitors to provide service in the Local Phone Service market on the level that [petitioner] is able to provide to its customers in that market. This conduct has had an impact on consumers and has impaired competition in the Local Phone Service [market] in an unnecessarily restrictive way. Am. Compl., ¶52.

Moreover, it is alleged that petitioner has

> increased the barriers to entry into the Local Phone Service market in the Geographic Market, has retarded the development of competition within the Local Phone Service market in the Geographic Market, and has weakened the ability of competitors to compete in the Local Phone Service market within the Geographic Market. Am. Compl., ¶53.

The amended complaint also alleges that petitioner's "anticompetitive conduct" "had and has a dangerous probability of preventing CLECs from establishing significant positions in the Local Phone Service [market]." Am. Compl., ¶56. Moreover, respondent alleges that "[t]here is no valid business reason for [petitioner's] behavior" which was undertaken with a "specific intent to acquire a, or

maintain its, monopoly in the Local Phone Service market." Am. Compl., ¶¶57, 58. Finally, it is alleged that the class of which respondent is a representative has been injured in its business and property interests. Am. Compl., ¶59.

These allegations constitute "a short and plain statement of the claim showing that the pleader is entitled to relief," as required by the Fed.R.Civ.Proc. 8(a)(2). A statement which "gives the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" is sufficient. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, (2002).

B. There Can Be No Legitimate Economic Rationale for the Breach of a Statutorily Mandated Interconnection Agreement.

Despite the express allegation that petitioner had no valid business reason for its conduct, it is urged that because an actionable Section 2 claim in this context requires exclusionary conduct that must "make no business sense *except for* its enabling monopoly returns," "respondent's claim fails that test." Pet. Br., at 21. This argument is remarkable in two respects.

First, dismissal of respondent's claim on account of a claimed lack of *specific language* in the amended complaint contravenes "[t]he Federal Rules [which] reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz, supra*, 534 U.S., at 514 (quoting *Conley, supra*, 355 U.S., at 48).

Second, petitioner urges that "*unprofitability* of the conduct without monopoly returns" is an "essential requirement for unlawful unilateral conduct," Pet. Br., at 23, while the government argues that "a refusal to sell an input to a rival when it requires the incumbent to forfeit profits would make obvious business sense." U.S. Br., at 20. This argument is fallacious in this case for several reasons.

One reason is that so-called "network effects" make it all but impossible for any benefit to accrue from petitioner's violation of an interconnection agreement that is *not* related to monopoly profits. Since no consumer will purchase telephone service from a local carrier that cannot interconnect with all other telephone users, competition is not possible without interconnection. If petitioner's conduct is profitable, it is because—and only because—of its anticompetitive effect. Petitioner's alleged conduct cannot be seen as a business strategy designed to accomplish anything *other* than the perpetuation of its market power.

Even if, *arguendo*, the interconnection agreement requires petitioner to sell access to its facilities below cost, the conduct still lacks any valid business justification. This Court has already established the legality of the TELRIC pricing formula. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Unfavorable terms in the wholesale market cannot justify exclusionary practices in that market to monopolize the retail market, where price-cost margins may be higher.

Moreover, sound public policy militates against using the profitable frustration of the 1996 Act as a legitimate justification for exclusionary conduct. The transition from a monopolistic market to a competitive one is bound to create a modicum of economic hardship for an incumbent. But this is what Congress has mandated. From the incumbent's perspective, it may be eminently sensible to attempt to forestall such a transition, but doing so is not a

legitimate form of competition. Having been encouraged to enter markets that were previously closed to them, a CLEC should not be impeded by an incumbent reluctant to abide by the law, nor should respondent be deprived of an antitrust remedy on the grounds that retarding the transition to competition bestows economic benefits on the incumbent. Conduct that frustrates the expressed will of Congress should not shield petitioners from the legal consequences of having inflicted injury of the type meant to be addressed by the antitrust laws. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)("The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

Finally, as argued above (in Section I.E., *supra*), the burden of showing a justification for allegedly exclusionary conduct lies with petitioner. A claimant should not be required to allege or prove the unprofitability of alleged anticompetitive conduct in order to state a claim for which relief can be granted. Creating such a burden serves no useful purpose. It frustrates the intent of Section 2 and imposes an unreasonable requirement on Section 2 claimants by requiring the allegation or proof of facts which, in most circumstances, cannot be known *ab initio*.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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